Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON,
TRUST CREATED UNDER THE WILL OF SAMUEL M. DAMON,

CHRISTOPHER JAMES DAMON HAIG,
Petitioner,

v.

SHARON DAMON, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Hawaii

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In Hawaii, as elsewhere, a will speaks from the time of the testator's death and must be interpreted in light of the laws in force at that time. When Samuel Mills Damon died in 1924, Hawaii interpreted testamentary language requiring "per stirpes" distribution in accordance with the common-law understanding recorded in the Restatement (First) of Property that provided for strict per stirpes or modified per stirpes distribution, depending upon the language of the will. Rather than apply this formulation, the Supreme Court of Hawaii applied an interpretation of "per stirpes" adapted from the Restatement (Second) of Property that effectively eliminated the possibility of a modified per stirpes distribution and radically diminished Petitioner's share in the residuary estate. It did so notwithstanding Petitioner's argument that retroactive application of the new rule violated his right to due process under the Fourteenth Amendment of the U.S. Constitution. The question presented is whether the state courts of Hawaii deprived Petitioner of his property without due process of law by retroactively altering the meaning of "per stirpes" to reduce his fully-vested interest in the corpus of the trust created by the Damon will.

PARTIES TO THE PROCEEDINGS

Before the Supreme Court of Hawaii, the appellants were: Petitioner Christopher Damon Haig, Michael E. Haig, Wendy Haig, the Estate of Joan Damon Haig, Brendan Damon Mesker, John Philip Damon, Daniel Holt, Melanie Holt, Allison Holt Gendreau, Katherine Achaval, Peter Baldwin, and Bennet Baldwin.

The appellees were: Sharon Damon; Siddhartha Damon, Shawnna Sorenson, Frank Edward Snow, Heidi Ann Snow, Julia Ann Snow, Samuel Renny Damon, Julio Damon Spee, Miles Samuel Spee, Philip Edward Spee, Pia Damon Spee.

App., *infra*, 11a-12a.

The Trustees Under the Will and of the Estate of Samuel Mills Damon, Deceased, David M. Haig, Fred C. Weyand, Walter A. Dods, Jr., and Paul M. Ganley, also entered an appearance.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher James Damon Haig respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Hawaii in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Hawaii is reported at 128 P.3d 815. App., *infra*, at 1a-42a. The order denying Petitioner's motion for reconsideration is reported at 132 P.3d 390. App., *infra*, at 74a. The rulings of the state probate court are unpublished. App., *infra*, at 43a-53a; 54a-61a.

JURISDICTION

The Supreme Court of Hawaii filed its opinion on February 16, 2006 and denied Petitioner's timely request for reconsideration on March 9, 2006. On May 26, 2006, Justice Kennedy extended the time within which to file this petition to and including July 7, 2006. No. 05A1097. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Due Process Clause of the Constitution, U.S. Const. Amend. XIV, § 1, provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

1. Samuel Mills Damon was born in Honolulu in 1845 to religious missionaries Rev. Samuel Chenery Damon and Julia Sherman (Mills) Damon. At age 27, Mr. Damon – a bank clerk at the Bank of Bishop & Co. – married Harriet Baldwin, and their marriage produced four children. By 1881, he had worked his way up to become a partner at the bank.

Bank founder Charles Reed Bishop met and married Princess Bernice Pauahi in 1850. Some thirty years later, she inherited the vast personal royal lands and treasures of the King Kamehameha dynasty. When Princess Bernice Pauahi

Bishop died (just a year after receiving her inheritance), she bequeathed more than nine thousand acres in the Moanalua Valley to Mr. Damon, who had assisted her in consolidating the Kamehameha lands. He joined her husband as one of the original trustees of her estate charged with establishing a school for boys and a school for girls, a position that Mr. Damon held for approximately 30 years.

Mr. Damon eventually rose to become a prominent banker and government financial advisor in the Hawaiian islands. When Mr. Bishop moved to San Francisco a decade after the death of his wife, Mr. Damon bought out Mr. Bishop's ownership interest and took over the Bank.

When Mr. Damon died in 1924, he left a sizable estate composed principally of real estate and bank stock.[1] (Indeed, until recently, the Damon estate was Hawaii's fourth largest private landowner.) A decade earlier, Mr. Damon had executed a Last Will and Testament. The Damon will placed his substantial holdings in trust and defined in great detail the manner in which Mr. Damon wanted the income from the estate to be distributed to his children and grandchildren while alive.

Mr. Damon also set up a mechanism for the distribution of the corpus – the principal – of the trust upon its termination. He directed the trustees to hold the remaining property "IN TRUST for all of my issue who shall then be living per stirpes and not per capita" following the death of the last to survive of his children and grandchildren in being at his death.[2] App., *infra*, at 36a n.18. He used distinct language to specify that the trust principal be distributed:

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[1] The Bank of Bishop & Co. later merged with several other banks and with subsequent name changes resulted in the name First Hawaiian Bank.

[2] In 1994, the Supreme Court of Hawaii determined that the trust would terminate upon the death of the last surviving grandchild of Mr. Damon, because constructing the trust as continuing indefinitely would violate the common-law Rule Against Perpetuities. *In re Estate of Damon*, 76 Haw. 120, 126 (1994) (*Damon I*). At that time, the corpus of the trust would be distributed according to the terms of the will. The precise formula for

> (i) to a designated class of individuals ("for all of my issue who shall then be living"); and
>
> (ii) in a specified manner ("per stirpes and not per capita")

Id.

Although his will did not specifically identify the root, or stock generation, of the stirpes, by ordinary rules of construction it is clear that he intended a strict per stirpes distribution of income and a modified per stirpes distribution of corpus at termination. The corpus provision of the will specified only that the corpus should be distributed "on the death of the last survivor of all of my children and grandchildren who shall be living [in 1924]." Because the will explicitly postponed distribution until the death of the last surviving grandchild (and there were no grandchildren born after his death), the great-grandchildren were the earliest possible generation of takers that could have members living at the time of distribution. In this way, he ensured that shares of the residual estate would be divided by the stocks of his great-grandchildren rather than split evenly among all his living descendants.

2. When property is divided on a "per stirpes" basis, property is "proportionally divided between beneficiaries according to their deceased ancestor's share." Black's Law Dictionary 1181 (8th ed. 2004). *See generally* Londo H. Brown, *The Testator's Intent – Vague Meanings of Clear Sounding Phrases*, 69 W. Va. L. Rev. 133, 148 (1967). The precise distribution, however, will depend on which generation of descendants is designated as the so-called "stirpital root." When the testator identifies the "deceased ancestor" by name, it is clear where the first division is to be made. When the testator does not identify the "deceased ancestor," the first division can be made in more than one place and the descendents' re-

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[Footnote continued from previous page]

distributing the residuary estate "per stirpes" was not discussed in this opinion.

spective shares can vary greatly. For example, if the stirpital root had been set at the level of Mr. Damon's children, this would produce two equal shares, one for the descendants of each of the two Damon children who had issue. If the stirpital root had been set at the level of Mr. Damon's grandchildren, this would produce five shares distributed by right of representation, one for the descendants of each of Mr. Damon's five grandchildren. And, if the stirpital root had been set at the level of Mr. Damon's great-grandchildren, this would produce eighteen shares, one for each of Mr. Damon's living great-grandchildren and one for each great-grandchild who died leaving descendants surviving at termination.

The formulation for determining stirpital distributions under Hawaiian law evolved substantially between 1924, when Mr. Damon died, and 2002, when the probate court issued its amended judgment interpreting his will. The evolution of the law affecting testamentary property is relevant to the interpretation of Mr. Damon's will because "a will speaks from the time of the testator's death, and that what is spoken is subject to the laws in force at that time." *In re Estate of Christian*, 652 P.2d 1137, 1140 (Haw. 1982). Indeed, under the law of Hawaii, "the will of the testator is the law of the case" and "beyond the reach of legislative and judicial action." *Campbell v. Kawananakoa*, 34 Haw. 333, 341, 346 (1937). Thus to interpret the testator's intent – to put oneself in the testator's shoes – one must examine the law the testator is presumed to have known when he drafted his will. *See In re Estate of Cunha*, 414 P.2d 925, 931 (Haw. 1966).

Because by definition, the Restatements are intended to be an "orderly statement of the general common law," the Restatement (First) of Property (1936) – published not long after Mr. Damon's death in 1924 – fairly reflects the state of the law when his will became effective. *See id.* at viii-ix. And a comment to Section 301 of the First Restatement addressed precisely the circumstance posed by the Damon will – the failure to identify the stirpital root. In such cases, the First Restatement provided that "the heads of the respective stirpes are the 'possible takers' who are of the oldest generation in

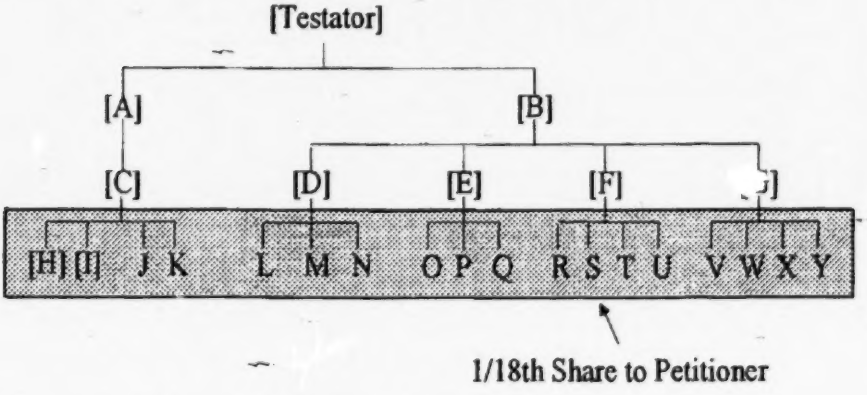
which there is at least one living member at the time when distribution is to be made." Restatement (First) of Property § 301 cmt. h. This method of distribution – looking to the oldest generation in which there is a living member – is known as "modified per stirpes," and it stands in distinction to "strict per stirpes" distributions, which look to the generation nearest to the testator, whether a member of such generation is living or not. The First Restatement taught that when a testator failed to identify the heads of the respective stirps, a modified per stirpes distribution was appropriate.

By the time the Damon trust was nearing termination, the law in Hawaii concerning per stirpes distributions had changed dramatically. In 1995, the Supreme Court of Hawaii decided *In re Trust Estate of Dwight*, 909 P.2d 561 (Haw. 1995), answering what it later called the "Restatement problem," *i.e.*, "whether Hawaii follows the First, Second, or Third Restatement with respect to the meaning of per stirpes." *In re Estate of Damon*, 128 P.3d 815, 826 (Haw. 2006) (*Damon II*). In *Dwight*, the state supreme court adopted the Second Restatement's definition of "per stirpes" as meaning that "the descendants are to take through or as representatives of a parent." *Dwight*, 909 P.2d at 563 (citing Restatement (Second) of Prop.: Donative Transfers §§ 25.9 & 28.2 (1988)). Thus, in Hawaii, since 1995, when a will specifies a per stirpes distribution, the presumption has been that the initial division will be at "the first generation, whether or not there is a survivor." *Id.* at 564 (citing Restatement (Second) of Prop.: Donative Transfers § 28.2 (1988)); *see also* Restatement (Third) of Prop.: Donative Transfers § 2.3 cmt. d (1999) (defining "strict per stirpes" as automatically dividing the estate "into primary shares at the generation nearest to the decedent (i.e., at the children generation)"). Essentially, the state supreme court changed the default rule to strict per stirpes distribution.

3. On April 8, 1998, Michael E. Haig, one of Mr. Damon's great-grandchildren and Petitioner's brother, filed a petition in the probate court seeking an interpretation of the Damon trust's corpus per stirpes distribution provision. Mr.

Haig, Petitioner, and other descendants argued that the will had to be interpreted according to the law of Hawaii as it stood in 1924. That iteration of the law, they argued, required a modified per stirpes distribution in accordance with the First Restatement. And under a modified per stirpes distribution, because the will postponed corpus distribution until the death of the last surviving grandchild in being and did not otherwise identify the root generation, the stirpital root should be set at the level of great-grandchildren. Thus, Mr. Haig, Petitioner and certain other descendents advocated a distribution whereby each great-grandchild of Samuel Damon would be entitled to 5.55 percent of the residuary estate, as illustrated below:

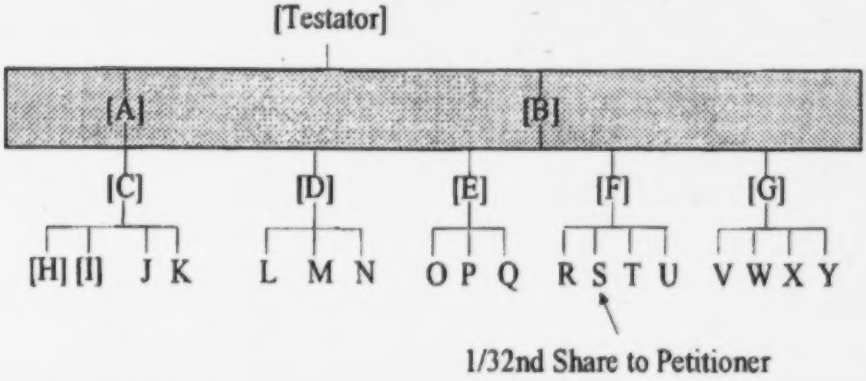
Modified Per Stirpes Distribution



[Brackets indicate deceased with issue]

Another group of descendents argued that the Supreme Court of Hawaii's decision in *Dwight* was controlling, and commanded a strict per stirpes distribution. Under a strict per stripes distribution, the stirpital root would be set at the level of Mr. Damon's children, resulting in a distribution of half of the residuary estate to the descendents of Samuel E. Damon, who had four grandchildren, and half to the descendents of Henry Fowler Damon, who had fourteen. Under this construction, Petitioner's share in the residuary estate would be reduced from 5.55 percent, to 3.125 percent, as illustrated below:

Strict Per Stirpes Distribution



[Brackets indicate deceased with issue]

Relying on the 1995 decision of the Supreme Court of Hawaii in *Dwight*, the probate court ruled that a strict per stirpes construction was appropriate. App., *infra*, at 49a-52a.

Michael Haig, Petitioner, and the other grandchildren of Henry Fowler Damon appealed to the Supreme Court of Hawaii arguing that the probate court erred in applying a strict per stirpes interpretation to the will. Petitioner objected specifically to the probate court's retroactive application of the 1995 rule of *Dwight* to a will the court was bound to construe according to the law of 1924. App., *infra*, at 65a.

The Supreme Court of Hawaii affirmed, placing principal reliance on the *Dwight* decision, which it viewed as controlling notwithstanding the fact that the Damon will became effective seven decades before. App., *infra*, at 27a. The state supreme court did not address Petitioner's argument that it was unlawful for the court to retroactively apply a new rule to divest Petitioner of rights in property he had held since birth.

Petitioner sought reconsideration before the state supreme court, raising his argument that the state courts' retroactive application of a rule created in 1995 to a will that became effective in 1924 had reduced his vested interest in property (from one-eighteenth to one-thirty-second of the residuary estate) and had therefore violated his rights to due process under the U.S. Constitution. App., *infra*, at 69a-73a.

The Supreme Court of Hawaii again rejected Petitioner's federal law argument. App., *infra*, at 74a-75a.

This petition follows.

REASONS FOR GRANTING THE PETITION

Under the corpus provision of the Damon will, from the time of his birth, Petitioner held vested rights in the residuary estate of his great-grandfather. This property interest was established in 1924 under the laws of Hawaii then in force. The Supreme Court of Hawaii retroactively applied new law (formulated no earlier than 1995) to reduce Petitioner's vested interest by 44 percent, rejecting Petitioner's arguments that doing so violated his rights under the Due Process Clause of the Fourteenth Amendment. That ruling conflicts with several of this Court's decisions concerning retroactive application of law. This Court's review is accordingly warranted. *See* Sup. Ct. R. 10(c).

The Decision Of The Supreme Court Of Hawaii Conflicts With Several Decisions Of This Court Concerning Retroactive Application Of Law.

While riding Circuit, Justice Story famously noted, "every statute, which takes away or impairs vested rights acquired under existing laws . . . must be deemed retrospective." *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814). And from its earliest days, this Court has been extremely reluctant to give retroactive effect to statutes affecting the private rights of parties absent a clear statement of legislative intent. *See, e.g., United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.) (in "private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties"); *Auffm'ordt v. Rasin*, 102 U.S. 620, 622 (1880) ("no law will be construed to act retrospectively unless its language imperatively requires such a construction").

This "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doc-

trine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *see also Hamdan v. Rumsfeld*, 548 U.S.__, slip op. at 11 (June 30, 2006) (noting the "presumption against retroactivity" that applies to new legislation). In conjunction with these deep roots, "the antiretroactivity principle finds expression in several provisions of our Constitution," including the Due Process Clause. *Landgraf*, 511 U.S. at 266.

The principle applies with particular force in the area of "property rights," where "predictability and stability are of prime importance." *Id.* at 271; *see also id.* at 271 n.25 (citing cases). *See also Dunn v. Micco*, 106 F.2d 356, 359 (10th Cir. 1939) ("The rule stare decisis applies with peculiar force and strictness to decisions which have established a rule of property. . . . The reasons are obvious. Property is acquired and sold in reliance on such rules."). Retroactive application of the laws "'compromise[s]'" "'the interests in fair notice and repose'" that are essential to any functioning system of private property and that the "'Due Process Clause . . . protects'". *Lynce v. Mathis*, 519 U.S. 433, 440 n.12 (1997) (quoting *Landgraf*, 511 U.S. at 244). Accordingly, this Court has generally refused to apply statutes retroactively where such application would deprive persons of vested property interests.

For example, in *Landgraf*, the Court refused to apply a new damages remedy under Title VII to cases pending before the new remedy's enactment. *See* 511 U.S. at 286. The Court reasoned that "substantially increasing the monetary liability of a private party" through retroactive application of a statute threatened to "sweep away settled expectations suddenly and without individualized consideration." *Id.* at 266, 284.

Similarly, in the earlier case of *Auffm'ordt*, this Court declined to apply retroactively an amendment to the bankruptcy laws that reduced the period for voidable transfers from four-months to two months where the result would be to foreclose a creditor's claim against the transferee. *See* 102 U.S. at 622. The Court recognized that retroactive application of the stat-

ute would effectively "destroy a vested right of property." *Id.* Consistent with the dictates of the Due Process Clause, the Court avoided that unfair result, holding that "where the rights of parties had been fixed under the old law," the case should be "governed by its provisions." *Id.*; *see also United States v. Sec. Indus. Bank*, 459 U.S. 70, 82 (1982) (declining to apply retroactively new bankruptcy rules to pre-existing liens, concluding retroactive application likely would violate the Takings Clause).

Retroactive application of newly crafted common-law rules poses no less of a threat to vested property rights than retroactive legislation. *See Dunn*, 106 F.2d at 359 (recognizing that a judicial "departure from an established rule of property may destroy important rights or titles acquired on the faith thereof"). Thus, where a rule has been changed by judicial fiat rather than legislative enactment, this Court has not hesitated to protect rights under the Due Process Clause by prohibiting retroactive application of the new judicially-created rule.

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), for example, this Court reversed – on due process grounds – a conviction based on the South Carolina Supreme Court's retroactive application of its new interpretation of the state's trespassing statute. *Id.* at 362. The Court held that by applying a 1961 construction of the State's trespassing law to acts that occurred in 1960, "the South Carolina Supreme Court . . . deprived petitioners of rights guaranteed to them by the Due Process Clause." *Id.* While the new construction was "of course valid for the future, it [could] not be applied retroactively, any more than a legislative enactment [could] be." *Id.*

By permitting retroactive application of new law to divest persons of their rights in property, the Supreme Court of Hawaii applied a due process rule that cannot possibly be reconciled with the decisions of this Court described above. The Supreme Court of Hawaii retroactively applied a rule that was created no earlier than 1995 to a will that became effective in

1924. For Petitioner, the consequences of that retroactive application are severe – slashing his vested interest in the residuary estate nearly by half. Left undisturbed, the actions of the state court here certainly will "destroy a vested right of property," *Auffm'ordt*, 102 U.S. at 622, and "sweep away" Petitioner's "settled expectations suddenly and without individualized consideration." *Landgraf*, 511 U.S. at 284. And *Bouie* makes clear that the Due Process Clause does not permit a judicial rule to "be applied retroactively, any more than a legislative enactment [could] be." 378 U.S. at 362. The Supreme Court of Hawaii disregarded these decisions, and this Court's review is accordingly warranted.[3]

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[3] The judgment of the Supreme Court of Hawaii also conflicts with the decisions of several other state courts of last resort that, in the context of wills, held that due process principles prohibited retroactive application of new legal principles to revise vested property rights. *See, e.g., Rowlett v. Moore*, 96 N.E. 835, 837 (Ill. 1911) ("To construe the act in question so as to give it a retroactive effect would, in effect, be to recognize the power of the Legislature to deprive persons of property rights without due process of law, which the Constitution forbids."); *Remington v. Metro. Sav. Bank of Balt.*, 25 A. 666, 667 (Md. 1893) ("by [the death of the testator] the estate of the distributees became vested and absolute, and could not be divested by any subsequent legislation, because it would divest vested rights"); *Mich. Trust Co. v. City of Grand Rapids*, 247 N.W. 744, 747 (Mich. 1933). The Supreme Court of Hawaii has thus set itself against the tide of state court interpretations of this important principle of federal law, and that conflict is an independent basis for the exercise of this Court's certiorari jurisdiction. *See* Sup. Ct. R. 10(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 7, 2006

APPENDIX A

Supreme Court of Hawai'i
In the Matter of the ESTATE OF Samuel M. DAMON, Deceased.
Trust Created Under the Will of Samuel M. Damon, Deceased
No. 25216

Feb. 16, 2006
As Amended Feb. 28, 2006
Reconsideration Denied March 9, 2006

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J. Thomas Van Winkle, Katherine G. Leonard, and Eric S.T. Young (of Carlsmith Ball), on the briefs, Honolulu, for trustees/respondents-appellees David M. Haig, Fred C. Weyand, Paul Mullin Ganley, and Walter A. Dods, Jr.

MOON, C.J., LEVINSON, NAKAYAMA, and ACOBA, JJ.; Circuit Judge WILSON, in place of DUFFY, J., Recused.

Opinion of the Court by MOON, C.J.

The instant case involves the interpretation of a corpus distribution provision in a trust (the trust) created under the last will and testament of Samuel Mills Damon. Petitioner-appellant Michael E. Haig (M. Haig) and four groups of respondents-appellants [hereinafter, collectively, Appellants], specifically identified *infra*, appeal from the June 21, 2002 amended judgment of the Circuit Court of the First Circuit, the Honorable Colleen K. Hirai presiding, entered pursuant to

Hawai'i Probate Rules (HPR) Rule 34 (2003)[1] and Hawai'i Rules of Civil Procedure (HRCP) Rule 54 (2003).[2] Essentially, Appellants seek review of the circuit court's May 24, 2000 findings of fact (FOF), conclusions of law (COL), and order with respect to a petition for interpretation, discussed more fully *infra*. The circuit court determined that, for purposes of distribution of the corpus upon the termination of the trust, the stirpital root[3] is set at the level of Damon's children, and, thus, the corpus is to be divided into two equal shares, representing Damon's two deceased children, both of whom left surviving issue, with the descendants of Damon's children taking per stirpes.

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[1] HPR Rule 34 provides in relevant part:

(a) *Entry of Judgment.* All formal testacy orders . . . shall be reduced to judgment and the judgment shall be filed with the clerk of the court. Such judgments shall be final and immediately appealable as provided by statute. *Any other order that fully addresses all claims raised in a petition to which it relates, but that does not finally end the proceeding, may be certified for appeal in the manner provided by Rule 54(b) of the Hawai'i Rules of Civil Procedure.* (Emphasis added.)

[2] HRCP Rule 54 provides in pertinent part:

(b) *Judgment upon multiple claims or involving multiple parties.* When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any . . . form of decision . . . which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties[.]

[3] The terms "stirpital root," "root," "stirps," and "stock" will be used interchangeably throughout this opinion.

On appeal, Appellants essentially contend that the circuit court erred in setting the stirpital root at the level of Damon's children. Specifically, M. Haig and three of the four groups of respondents-appellants maintain that the stirpital root should be set at the level of Damon's great-grandchildren, and the remaining group of respondents-appellants maintain that the stirpital root should be set at the level of Damon's grandchildren.

For the reasons discussed more fully *infra*, we hold that Appellants' contentions lack merit. Accordingly, we affirm the circuit court's June 21, 2002 amended judgment.

II. BACKGROUND

A. *Factual Background*

On November 10, 1914, Damon executed his last will and testament (the will), creating the trust to administer his estate upon his death. Damon's estate consisted of considerable land holdings, including Moanalua Gardens, various business interests, and other assets. At the time Damon executed his will, three of his four children, Mary, Henry, and Douglas, were alive. Damon's fourth child, Samuel, had died in 1904, leaving four children. One of Samuel's children died as an infant in 1905, and Samuel's other three children were alive when Damon executed his will. Damon's child, Henry, also had one child, Harriet D. Baldwin, who was then Henry's only child and was alive when Damon executed his will.

On January 12, 1918, Damon was declared incompetent, and an order for appointment of guardianship was filed with the circuit court. Damon died on July 1, 1924, survived by his widow and his three children (Mary, Henry, and Douglas). Two of Damon's three grandchildren by Samuel predeceased Damon without any issue. Therefore, only one of Samuel's four children, Samuel R. Damon, survived Damon. Also surviving Damon was Henry's child, Harriet D. Bald-

win, previously mentioned, and Henry's three additional children, Frances Holt, Joan Haig (J. Haig), and Henry E. Damon. Damon's two other children, Mary and Douglas, did not have any children, and both ultimately died without issue. Thus, at the time of Damon's death, Damon was survived by his widow, three of his four children, and five of his eight grandchildren. While four of Damon's surviving grandchildren (Harriet D. Baldwin, Frances Holt, J. Haig, and Henry E. Damon) descended from Damon's son Henry's line, only one of Damon's surviving grandchildren (Samuel R. Damon) descended from Damon's son Samuel's line. No more grandchildren were born after Damon's death.

Damon's will was admitted to probate following Damon's death in 1924. The ten-page will consisted of four numbered sections and was virtually devoid of any punctuation. The will was prefaced with routine administrative matters, including provisions dictating the payment of debts and funeral expenses, the creation of the trust, and the selection of the initial trustees. The first section of the will instructs the trustees to maintain Moanalua Gardens for the recreation and enjoyment of the public and to distribute the flowers, fruits, and "other vegetable products" of Moanalua Gardens to Damon's widow and, upon her death, "to such of my children as shall continue to live in equal shares[.]" After the death of his widow and children, the flowers, fruits, and other vegetable products were to form part of Damon's residuary estate. The second section of the will essentially provides that the trustees have discretion in managing Damon's business interests. The third section of Damon's will provides that a portion of the income of the trust is to be used for the maintenance of Moanalua Gardens.

The fourth section of the will contains, *inter alia*, Damon's instructions for the distribution of income and corpus from the trust, providing in relevant part:

To pay the balance of the said net income to my said wife during her life and on her death and for and during the period of the life of the last survivor of all of my children and grandchildren who shall be living at my decease to pay one-fourth of the said balance of the said net income to my daughter Mary Damon during her life and on her death to her issue such issue in every case taking in succession by right of representation and to pay one-fourth of the said balance of the said net income to my son Henry F. Damon for his life and on his death to his issue such issue in every such case taking in succession by right of representation and to pay one-fourth of the said balance of the said net income to my son Douglas Damon for his life and on his death to his issue such issue in every such case taking in succession by right of representation and to pay the remaining one-fourth of the said balance of the said net income to the children of my deceased son Samuel E. Damon and the survivors and last survivor of them during their his or her lives or life provided however that if any of the children of the said Samuel E. Damon shall die leaving any child or children him or her surviving then and in every such case last mentioned child or children shall take the share of the one-fourth of the said balance of the said net income during his her or their lives or life which his her or their parent would have taken if such parent had continued to live and on the death of the last survivor of the children of the said Samuel E. Damon my trustee shall pay the one-fourth of the said balance of the said net income during

> the life of the last survivor of all of my children and grandchildren who shall be living at my decease to all of the issue of my said son Samuel E. Damon such issue in every such case taking in succession by right of representation provided however and I hereby declare that on the death of any of my children without leaving lawful issue him or her surviving or on the failure of the issue of any of my children whether living at my death or dying in my lifetime then and in every such case the share of the balance of the said net income of my said residuary estate which my said child so dying or the issue of any of my said children so dying would be entitled to if living and any additional share or shares which may accrue or be added thereto by virtue of this present proviso shall thereafter go and accrue by way of addition to the share or shares of my other children or child or the issue of my other children or child who shall be dead of the said balance of the said net income *And on the death of the last survivor of all of my children and grandchildren who shall be living at the time of my death my trustees shall hold all of my said property of every description nature or kind whatsoever and wheresoever the same may be IN TRUST for all of my issue who shall then be living per stirpes and not per capita[.]*

(Emphasis added.) The non-emphasized provision constitutes the income distribution provision and has not faced any legal challenge. Pursuant to the income distribution provision, following the death of Damon's widow and the deaths of Mary and Douglas (Damon's two children who died without issue), the trustees were to distribute the remaining income, after

deducting maintenance expenses relating to Moanalua Gardens and other administrative expenses, as follows: (1) one-half to the issue of Samuel Damon, by representation in each generation; and (2) one-half to the issue of Henry Damon, by representation in each generation. The emphasized provision constitutes the corpus distribution provision and is at the center of dispute in this case.[4]

B. ***Earlier Proceedings***

On January 17, 1992, the trustees[5] filed a petition for instructions regarding the termination of the trust (petition for instructions) with the circuit court. Therein, the trustees stated that, based upon the language of the will and principles of will construction, the trust could be construed to terminate either: (1) upon the death of the last survivor of Damon's children and grandchildren living at the time of his death, *i.e.*, the last measuring life; or (2) twenty-one years after the death of such last survivor or last measuring life. At the time of filing, all of Damon's children had already died. However, three of Damon's grandchildren (Frances D. Holt, Harriet D. Baldwin, and J. Haig), who were living at the time of his death, were still alive, although they were all in their seventies. The circuit court entered an order granting the petition for instructions and issued instructions to the trustees to continue the trust for twenty-one years after the death of the last

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[4] Although not apparent from the record, we note that one group of respondents-appellants mention in their opening brief that the value of Damon's estate at distribution could well approach one billion dollars.

[5] At the time, the trustees of Damon's trust were D. Hebden Porteus, David M. Haig, Fred C. Weyand, and Paul Mullin Ganley. The current trustees remain the same, except Walter A. Dods, Jr. has replaced D. Hebden Porteus. David M. Haig is also the son of J. Haig, thus, making him Damon's great-grandchild.

measuring life, *i.e.*, the last survivor of Damon's three living grandchildren.

However, on March 30, 1994, this court vacated the circuit court's order and remanded for issuance of instructions to terminate the trust upon the death of the last measuring life. *Trust Created Under the Will of Damon*, 76 Hawai'i 120, 869 P.2d 1339 (1994) (*Damon I*). Thus, pursuant to *Damon I*, the trust was to terminate upon the death of the last survivor of Damon's three living grandchildren, Frances D. Holt, Harriet D. Baldwin, and J. Haig.

C. *Procedural History*

1. The Per Stirpes Petition

On April 8, 1998, anticipating the termination of the trust,[6] M. Haig, a great-grandchild of Damon and a grandchild of Henry Damon, filed the Petition Seeking an Interpretation of the Will of Samuel Mills Damon as it Relates to the

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[6] At the time, Frances D. Holt, Harriet D. Baldwin, and J. Haig were still alive. However, on March 12, 2004, after the notice of appeal was filed for the instant case, counsel for one group of respondents-appellants filed a Suggestion of Death with this court, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 43(a) (2003) (relating to filing a motion suggesting the death on the record after the filing of the notice of appeal), stating that Frances D. Holt and Harriet D. Baldwin had passed away.

Moreover, J. Haig had also passed away during the pendency of the instant appeal, thus, triggering the termination of the trust. Consequently, on January 23, 2006, this court approved the motion for substitution of M. Haig as the executor of the estate of J. Haig. Inasmuch as the briefings for this appeal were completed while J. Haig was still alive, we continue to refer to J. Haig simply as "J. Haig," rather than "M. Haig, as executor of the estate of J. Haig." Because J. Haig was still alive at the time the instant matter was considered by the circuit court, we also refer to her in the discussion as a live person.

Distribution of the Corpus at Termination of the Trust (the per stirpes petition) with the circuit court. Therein, M. Haig acknowledged that Damon intended a per stirpes, rather than a per capita, distribution of the corpus, as mandated by the corpus distribution provision. M. Haig specifically sought a determination as to whether Damon intended the stirpital root to be set at the level of Damon's: (1) children; (2) grandchildren; or (3) great-grandchildren.

According to the per stirpes petition, if the stirpital root is set at the level of Damon's children, then this produces two shares, one for the descendants of Samuel Damon and one for the descendants of Henry Damon, resulting in the same distribution scheme as income. If the stirpital root is set at the level of Damon's grandchildren, then this produces five shares, one for the descendants of Damon's five grandchildren (Samuel R. Damon, Harriet D. Baldwin, J. Haig, Frances D. Holt, and Henry E. Damon). And, if the stirpital root is set at the level of Damon's great-grandchildren, then this produces eighteen shares, one for each of Damon's great-grandchildren or the issue of any who predeceases trust termination, assuming either that: (1) the now-living great-grandchildren are still alive at trust termination and no new great-grandchildren are born or adopted in; or (2) any great-grandchild now living who dies before trust termination leaves issue then surviving.[7] In addition, M. Haig also requested the circuit court to award reasonable attorneys' fees and costs from the corpus of the trust to any beneficiary appearing and rendering assistance in the present matter.

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[7] At the time M. Haig filed the per stirpes petition, one of Damon's eighteen great-grandchildren, Heather D. Sorenson, had already passed away. However, Sorenson left surviving issue who would take her share by representation.

In response to the per stirpes petition, several of Damon's descendants asserted three different positions as to which generation of Damon's descendants, *i.e.*, Damon's children, grandchildren, or great-grandchildren, should serve as the stirpital root for the purpose of distributing the corpus upon termination of the trust. Four descendants, all descending from Damon's son Henry's line, contended that the stirpital root should be set at the level of Damon's great-grandchildren.[8] One group of descendants, also descending from Damon's son Henry's line, asserted that the stirpital root should be set at the level of Damon's grandchildren.[9]

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[8] Specifically, the four descendants are: (1) M. Haig; (2) Christopher D. Haig (C. Haig); (3) Wendy Haig (W. Haig); and (4) J. Haig. M. Haig, C. Haig, and W. Haig are the children of J. Haig. As previously stated, J. Haig is one of Damon's grandchildren and is one of Henry Damon's children. On appeal, J. Haig and W. Haig [hereinafter, collectively, J. & W. Haig] jointly filed an opening brief, arguing that the stirpital root should be set at the level of Damon's great-grandchildren.

At the circuit court level, respondents-appellants Brendan D. Mesker and John P. Damon individually filed statements of no position regarding the per stirpes petition. On appeal, Brendan D. Mesker and John P. Damon [hereinafter, collectively, Mesker & J. Damon] jointly filed an opening brief, contending that the stirpital root should be set at the level of Damon's great-grandchildren. Mesker and J. Damon are the children of Henry E. Damon, the grandchildren of Henry Damon, and the great-grandchildren of Damon and, thus, also descend from Damon's son Henry's line.

Therefore, on appeal, the following four groups of respondents-appellants submitted that the stirpital root should be set at the level of Damon's great-grandchildren: (1) M. Haig; (2) C. Haig; (3) J. & W. Haig; and (4) Mesker & J. Damon.

[9] Specifically, this group of descendants is comprised of eight individuals, respondents-appellants: (1) Frances D. Holt; (2) Daniel F. Holt; (3) Allison H. Gendreau; (4) Melanie F.H.

[Footnote continued on next page]

Finally, three groups of descendants, all descending from Damon's son Samuel's line, alleged that the stirpital root should be set at the level of Damon's children.[10]

[Footnote continued from previous page]

Bostock; (5) Harriet D. Baldwin; (6) Peter D. Baldwin; (7) Bennet M. Baldwin; and (8) Katherine B. Achaval [hereinafter, collectively, Holt & Baldwin Families]. As previously stated, Frances D. Holt and Harriet D. Baldwin are Damon's grandchildren and Henry's children, and their deaths have been suggested on the record by counsel. Daniel F. Holt, Allison H. Gendreau, and Melanie F.H. Bostock are the legally adopted children of Frances D. Holt. Peter D. Baldwin, Bennet M. Baldwin, and Katherine B. Achaval are the children of Harriet D. Baldwin.

[10] Specifically, these three groups of descendants, comprising of twelve individuals, are respondents-appellees: (1) Sharon Damon, Siddhartha Damon, and Shawnna Sorenson [hereinafter, collectively, Sharon Damon Appellees]; (2) Heidi Snow, Julia Snow, and Frank Snow [hereinafter, collectively, Snow Appellees]; and (3) Samuel E. Damon, Samuel Renny Damon, Pia Spee, Julio Spee, Miles Spee, and Philip Spee [hereinafter, collectively, Spee Appellees].

With respect to Sharon Damon Appellees, Sharon Damon is the child of Samuel R. Damon, the grandchild of Samuel Damon, and the great-grandchild of Damon. Shawnna Sorenson is the child of Heather D. Sorenson, Damon's only deceased great-grandchild. Heather D. Sorenson and Sharon Damon were sisters.

With respect to Snow Appellees, Heidi Snow is Shawnna Sorenson's sister and, thus, a great-great-grandchild of Damon. Julia Snow and Frank Snow are Heidi Snow's children. And, with respect to Spee Appellees, Samuel E. Damon is the child of Samuel R. Damon, the grandchild of Samuel Damon, and the great-grandchild of Damon. In other words, Samuel E. Damon, Sharon Damon, and Heather D. Sorenson were siblings. Samuel Renny Damon and Pia Spee are Samuel E. Damon's children. Julio Spee, Miles Spee, and Philip Spee are Pia Spee's children.

On May 24, 2000, the Honorable Virginia Lea Crandall issued her "Findings of Fact, Conclusions of Law, and Order Interpreting the Will of Samuel Mills Damon as it Relates to Distribution of Trust Corpus Upon Termination of the Samuel Mills Damon Trust and Instructing Trustees as to Determination of Stirps" (the May 24, 2000 FOFS, COLS, and Order). Therein, the circuit court found in favor of the interpretation advocated by the three groups of descendants descending from Damon's son Samuel's line, *i.e.*, that the stirpital root is to be set at the level of Damon's children. The circuit court entered the following relevant conclusions:[11]

> [3.] The intent of [Damon] with respect to the [corpus] of the [t]rust, as again expressed by [the fourth section of Damon's will], was that it be distributed upon termination (which the Supreme Court of Hawai'i in *Damon I* determined to be at the death of the last grandchild of [Damon]) to "all of [my] issue who shall then be living per stirpes and not per capita." There is no ambiguity in the [w]ill as to the intent of [Damon] to avoid a per capita distribution of the [t]rust [corpus]. The direction in [the fourth section of Damon's will] to distribute "per stirpes and not per capita" precludes any interpretation of the [w]ill that would permit the descendants of [Damon] to take in their own right rather than by representation.

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[11] The May 24, 2000 FOFs, COLs, and Order did not contain any numbering system for the COLs. However, each COL was separated into distinct paragraphs, and we note that some of the parties on appeal had self-numbered the COLs at the beginning of every new paragraph. Thus, we did the same for ease of discussion.

[4.] The Holt and Baldwin [F]amilies have argued that this Court should "harmonize" the [corpus] distribution provision with the [w]ill as a whole and find that the stirps begin at the level of the grandchildren of [Damon]. The Court is not persuaded by this argument.

[5.] [M. Haig], [C. Haig], and [J. Haig] have argued that the language of the [w]ill evidences [Damon's] intent that the stirps for calculating the distribution of the [corpus] of the [t]rust should be found at the first generational level at which there are living issue who share in the [corpus] distribution. That would likely result in the stirps being set at the level of [Damon's] great-grandchildren. This argument is based in part on [Damon's] use of different language in directing disposition of the [corpus] ("per stirpes" and among "all of my issue who shall then be living") than he used for directing distribution of income ("by right of representation" among the issue of named children) and on the theory that if [Damon] had intended the same distribution of both principal and income, he would have used the same language in directing their disposition.

[6.] While differing words are indeed used, the Court concludes that they do not evidence a difference in intent or meaning. In fact, the Court concludes that the words "per stirpes" as used with respect to the distribution of [corpus] and the words "by right of representation" as used with respect to the distribution of net income mean the same thing. [discussing cases and citing cases from other jurisdic-

tions holding that "per stirpes" means "by representation"].

[7.] One common method of determining the meaning of "per stirpes," in cases where the first takers are descended from the prior income takers, is to presume that the [corpus] upon termination will be distributed in the same manner as income was distributed prior to termination. Despite arguments that [Damon] intended the income and [corpus] of the [t]rust to be distributed differently because of different language and punctuation in the income distribution [provision] and [corpus] distribution [provision], the Court is not persuaded that any language, punctuation (or lack thereof) or capitalization in the [w]ill demonstrates or reflects an intent to treat the distribution of corpus differently from the distribution of income. The differing language, capitalization and punctuation cited reflect a distinction without a difference.

[8.] The Hawai'i Supreme Court used similar reasoning in *Trust Estate of Dwight*, 80 Hawai'i 233, 908[909] P.2d 561 [(1995)]. In that case the testator had provided for trust income to be distributed to his children (one daughter and two adopted grandchildren) per stirpes until all of them had died. The corpus was then to be distributed to "the issue of my said adopted children as shall then be living in equal shares per stirpes." The Court held that the stirpital root "begins with the ancestors of those who are to take and not with the takers themselves." *Id.* at 235, 908[909] P.2d at 563. In reaching its conclusion, the

Court noted that the testator "intended distribution of the trust corpus to parallel income distribution." *Id.* at 238, 908[909] P.2d at 566.

[9.] Many courts have wrestled with the meaning of "per stirpes" in wills and have relied on American cases involving trusts for a testator's own children to determine the testator's issue. Absent very unusual facts, they almost uniformly find the stirps at the generation of testator's children. [discussing *In re Morton's Estate*, [48 N.J. 42,] 222 A.2d 185 (N.J.1966)].

. . . .

[11.] When [Damon] provided in [the fourth section of his will] that the [corpus] of the [t]rust would be distributed upon its termination (as determined in *Damon I*) to "all of my issue who shall then be living per stirpes," he [ ] intended that the stirps should be set at the level of his children.

[12.] [M. Haig] has argued that the new Uniform Probate Code, Hawai'i Revised Statutes ("HRS") §§ 560 *et. seq.*, which became effective January 1, 1997, provides the intestacy law as the default rule in interpreting class gifts. HRS § 560:2-708 follows an intestacy scheme of distribution for class gifts to issue. HRS §§ 560:2-103 ("share of heirs") and 560:2-708 do not apply to the class gift herein because [Damon] specified the manner of his intended distribution. The Uniform Probate Code provisions apply only when the testamentary instrument is silent as to the manner of distribution.

(Footnotes omitted.) Finally, the circuit court ordered, *inter alia*, that:

> 3. For purposes of distribution of the corpus upon termination of the [t]rust, the Court finds and concludes that the stirps are the ancestors of the takers and not the first takers and that the stirps are the children of [Damon] as [Damon] is the common ancestor from whom representation begins.
>
> 4. The Trustees are instructed that for purposes of distribution of the corpus upon termination of the [t]rust, the division of the stirps shall be made at the level of the children of [Damon].

2. The Fee Bearing Petition, the Fee Bearing Order, the Fee Petition, and the Fee Order

Shortly after M. Haig filed the per stirpes petition but prior to the entry of the May 24, 2000 FOFs, COLs, and Order, trustees/respondents-appellees David M. Haig, Fred C. Weyand, Paul Mullin Ganley, and Walter A. Dods, Jr. [hereinafter, collectively, the trustees] filed a "Petition for Court Appointment of Attorneys to Brief the Issues Raised in the Per Stirpes Petition and to Have Beneficiaries Pay for the Legal Expenses of Attorneys They Retain" (the fee bearing petition) with the circuit court on April 22, 1998. Therein, the trustees sought an order determining that Damon's estate should not be required to pay for the beneficiaries' fees and costs or, in the alternative, to either have the circuit court: (1) appoint three attorneys, one to represent the interests of those asserting each of the three positions on the question of where the stirpital root should be set; or (2) determine that Damon's estate be responsible for the reimbursement of only one reasonable fee for each of the three positions.

On June 26, 1998, the circuit court entered an order (1) denying with prejudice the trustees' request for the appointment of three attorneys and (2) denying without prejudice the trustees' alternative requests that (a) Damon's estate not be required to pay for the fees and costs of attorneys hired by the beneficiaries and (b) Damon's estate be required to pay only one reasonable fee for each of the three positions (the fee bearing order).

On June 5, 2000, J. Haig filed a "Petition for Court's Instructions to the Trustees Regarding Reimbursement of Attorneys' Fees and Request for Reimbursement of Attorneys' Fees From Trust Funds" (the fee petition) with the circuit court. Therein, J. Haig requested reimbursement of the $124,832.72 in attorneys' fees and costs she had incurred in connection with the per stirpes petition and the fee bearing petition.[12]

On June 19, 2001, the circuit court entered an order granting in part and denying in part the various requests for attorneys' fees and costs by the parties (the fee order). With respect to J. Haig's fee petition, the fee order provided in relevant part:

> IT IS ORDERED:
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> . . . .
>
> 10. With respect to [the fee petition], counsel [for J. Haig] provided assistance to the Court by providing copies of cases from other jurisdictions, addressing issues involving multiple attorneys representing the same position, and

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[12] Many of the respondents-appellants and the respondents-appellees also filed their own fee petitions; however, none of their fee petitions are at issue in this case.

> assisting in resolving the Per Stirpes FOF/COL among the parties. However, [the fee petition] contains no specific declaration or separate statement from [J. Haig] describing any impact on her estate planning interest. Throughout the time sheets, there are repeated references to telephone calls and letters to [M. Haig], but no indication of communications with [J. Haig]. In assessing the reasonableness of fees, and whether [Damon's estate] should bear the costs of her participation, the Court wants to make certain that [M. Haig] did not retain Mr. [Carroll S.] Taylor [M. Haig's own counsel] and Mr. [A. James] Wriston [J. Haig's counsel] to present two different positions before the Court.][13] This is not the case with the Holt-Baldwin Fee Petition, which was filed by one firm for multiple people([J. Haig]'s sisters and their children). . . .
>
> *Therefore, although [J. Haig] is an income beneficiary, she does not have standing in this matter and her petition is denied. However, to the extent that counsel for [J. Haig] provided assistance to the Court, the Court awards reimbursement in the amount of $35,000 to reflect the value provided to the Court and to [Damon's estate].*

(Emphasis added.)

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13 M. Haig, J. Haig's son, served as J. Haig's attorney-in-fact.

3. Judgment and Appeal

On November 6, 2001, the circuit court entered a judgment, incorporating, *inter alia*, the May 24, 2000 FOFs, COLs, and Order, the fee bearing order, and the fee order (the November 6, 2001 entry of judgment). Appellants timely appealed from the November 6, 2001 entry of judgment. However, on May 30, 2002, this court dismissed the appeals for lack of appellate jurisdiction inasmuch as the November 6, 2001 entry of judgment was not certified for appeal pursuant to HRCP Rule 54(b). *Trust Created Under the Will of Damon*, No. 24740.

On June 21, 2002, the circuit court entered an amended judgment, again incorporating, *inter alia*, the May 24, 2000 FOFs, COLs, and Order, the fee bearing order, and the fee order, pursuant to HRCP Rule 54(b) and HPR Rule 34. This timely appeal followed.

II. STANDARDS OF REVIEW

A. *Standing*

This court reviews a circuit court's decision regarding a party's standing *de novo* under the right/wrong standard. *Mottl v. Miyahira*, 95 Hawai'i 381, 388, 23 P.3d 716, 723 (2001).

B. *Construction of a Trust*

The construction of a testamentary trust is a question of law which this court reviews *de novo* under the right/wrong standard. *Damon I*, 76 Hawai'i at 123-24, 869 P.2d at 1342-43 (citation omitted).

> When construing a trust, this court is guided by principles relating to the interpretation of trusts as well as those relating to the interpretation of wills. A fundamental rule when construing trusts is that the intention of the settlor as expressed in a trust instrument shall prevail

> unless inconsistent with some positive rule of law. Additionally, in construing a trust document to determine the settlor's intent, the instrument must be read as a whole, not in fragments.

In re Lock Revocable Living Trust, 109 Hawai'i 146, 151-52, 123 P.3d 1241, 1246-47 (2005) (internal quotation marks and citations omitted).

III. DISCUSSION

Preliminary, we address whether J. Haig had standing to participate in the matter of the construction of the instant will. As previously stated, the circuit court concluded in the fee order that J. Haig lacked standing to participate in the instant matter, and, thus, her fee petition was denied. Thereafter, we address the crux of the instant appeal, *i.e.*, the construction of the corpus distribution provision of the will.

A. *Standing*

J. & W. Haig maintain on appeal that the circuit court erred in determining that J. Haig, a current income beneficiary of the trust, lacked standing to participate in the instant matter concerning the distribution of the corpus upon termination of the trust. J. & W. Haig contend that J. Haig is an "interested person" under Hawai'i Revised Statutes (HRS) § 560:1-201 (Supp. 2004), quoted *infra*, and, therefore, J. Haig has standing. In addition, J. & W. Haig argue that J. Haig "has standing in this matter by virtue of her estate planning interest in the outcome of the per stirpes petition." Specifically, J. & W. Haig assert that the percentage of the corpus J. Haig's children will eventually inherit upon termination of the trust has a "self-evident effect on the amounts that [J. Haig] may wish to bequeath to them and the amounts she can comfortably bequeath to others."

In response, the trustees contend that, in order to have standing for purposes of the instant matter, J. Haig must have

a property right in, or claim against, Damon's estate at issue in the instant proceeding. The trustees argue that J. Haig is not an interested person under HRS § 560:1-201 inasmuch as (1) the per stirpes petition requested a judicial determination regarding the distribution of the corpus upon termination of the trust and (2) J. Haig does not stand to inherit any of the corpus. In response to the trustees' contentions, J. & W. Haig counter that the trustees interpret section 560:1- 201 "too narrowly" and, instead, submit that the section contemplates "instances where a party who otherwise has no property right in or claim against an estate may nevertheless be an interested person for a particular proceeding only."

HRS § 560:7-201(a) (1993) provides that "[t]he [probate] court has jurisdiction of proceedings initiated by trustees and *interested persons* concerning the internal affairs of trusts." (Emphasis added.) In turn, HRS § 560:1-201 defines "interested person" as

> includ[ing] heirs, devisees, children, spouses or reciprocal beneficiaries, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. *The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.*

(Emphasis added.) This court recently construed the last sentence in the foregoing definition of interested persons in *In re Estate of Campbell*, 106 Hawai'i 453, 106 P.3d 1096 (2005). Therein, this court stated that

> [t]he last sentence of the definition does not broaden the definitional reach of "interested

> person." *Rather[,] it allows the court to determine the sufficiency of a party's interest relative to the particular probate proceeding. It is thus possible that one may be an "interested person" for the purpose of one particular proceeding but not another . . . . An interested person, however, will always possess an interest in the estate itself.*

Id. at 459, 106 P.3d at 1102 (quoting *Estate of Thorne*, 704 A.2d 315, 318 (Me. 1997) (brackets omitted)) (some emphases in original and some added). In addition, this court also cited to *In re Estate of Juppier*, 81 S.W.3d 699, 701 (Mo. Ct. App. 2002), for the proposition that an interested person "only include[s] those with a financial interest in an estate." *In re Estate of Campbell*, 106 Hawai'i at 459, 106 P.3d at 1102 (internal quotation marks omitted).

In *Estate of Thorne*, the natural father of a child (the child) who was killed in an automobile accident brought a wrongful death action against the driver and the driver's employer [hereinafter, collectively, the wrongful death defendants]. 704 A.2d at 316. The adoptive father of the child's brother subsequently filed a petition for determination of the child's heirs. *Id.* The probate court determined that the termination of parental rights acted to sever any inheritance rights that the natural father had in the child's estate and that the child's immediate heirs were his brother and half sister. *Id.* at 316-17. Consequently, the wrongful death defendants moved to intervene in the probate proceedings, seeking reconsideration of the determination of the child's heirs. *Id.* at 317. The probate court denied the wrongful death defendants' motion. *Id.* On appeal, the Supreme Judicial Court of Maine affirmed, noting that

> [t]he determination of [the child's] heirs will affect on whose behalf the wrongful death action may be brought and consequently may af-

> fect the determination of damages in that action. The sole interest of the [wrongful death defendants] in the determination of [the child's] heirs is the minimization of the extent of their potential liability in the wrongful death action. They attempt to serve this interest by advocating the heirship rights of the heirs most likely to recover the least amount of damages in the wrongful death action. Their interest is not a "property right in or claim against" [the child's] estate. The [wrongful death defendants] fall outside the scope of [Maine's statutory definition of interested persons][14] and lack standing as "interested parties" to participate in the determination of [the child's] heirs.

Id. at 318.

Likewise, in the instant case, J. Haig falls outside the scope of HRS § 560:1-201 and lacks standing as an interested party to participate in the determination of the residuary beneficiaries of the trust. The particular purpose of the instant probate proceeding is to determine where to place the stirpital root in order to ascertain the amount each residuary beneficiary will receive upon termination of the trust. Although J. Haig is currently an income beneficiary, she does not have any interest *in* Damon's estate that will be affected by *this* particular probate proceeding inasmuch as she is merely a measuring life and not a residuary beneficiary. Moreover, similar to the wrongful death defendants in *Estate of Thorne*, J. Haig may have a financial interest in *how*

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[14] The relevant portion of Maine's statutory definition of interested persons is identical to Hawaii's statutory definition of interested persons. *See* 18-A M.R.S. § 1-201(20) (1981).

Damon's estate will ultimately be distributed; however, her interest is not a property right in or claim against Damon's estate. Thus, J. Haig's interest relative to the instant probate proceeding is insufficient for her to be considered an interested person. Accordingly, we hold that the circuit court correctly concluded that J. Haig lacked standing to participate in the instant matter.

Furthermore, J. & W. Haig also request that this court remand the issue of J. Haig's award of attorneys' fees for "reconsideration" inasmuch as beneficial value to the trust and the court, not standing, is the prerequisite for an award of attorneys' fees. Stated differently, J. & W. Haig apparently argue that the circuit court improperly considered J. Haig's lack of standing as a factor in reducing the amount of attorneys' fees awarded to her. However, based on the transcript of the hearing on the fee petition, it is apparent that the circuit court did not, as J. & W. Haig claim, reduce the amount of attorneys' fees awarded to J. Haig as a result of J. Haig's lack of standing. Instead, the circuit court awarded J. Haig $35,000 in attorneys' fees to reflect the beneficial value provided to the trust. The circuit court stated:

> And so the Court would make a--I guess lump sum order of payment in the amount of payment of $35,000 to [J. Haig's law firm] as a benefit that they provided to the Court notwithstanding generally that she does not have standing on this particular issue, *but to reflect the value to the state [sic] that was provided.*

(Emphasis added.) Thus, based on the foregoing, it reasonably appears that the circuit court awarded J. Haig $35,000 in attorneys' fees *in spite of* her lack of standing, *not as a result of* her lack of standing. Accordingly, we decline to remand the issue of J. Haig's award of attorneys' fees for reconsideration.

B. *Interpretation of Damon's Will*

As previously stated, M. Haig, C. Haig, J. & W. Haig, and Mesker & J. Damon essentially contend that the stirpital root should be set at the level of Damon's great-grandchildren. Holt & Baldwin Families assert that the stirpital root should be set at the level of Damon's grandchildren. And, Sharon Damon Appellees, Snow Appellees, and Spee Appellees [hereinafter, collectively, Appellees] maintain that the circuit court correctly concluded that the stirpital root is set at the level of Damon's children.

1. Meaning of "Per Stirpes"

C. Haig and J. & W. Haig contend that Damon intended a "modified per stirpes" or, in other words, a "per capita with representation," distribution of the corpus. Relying heavily upon the Restatement (First) of Property (First Restatement) and the Restatement (Third) of Property (Third Restatement), they specifically argue that per stirpes has four different meanings, to wit: (1) "strict per stirpes;" (2) modified per stirpes or per capita with representation; (3) "per-capita-with-per-capita representation;" and (4) "per-capita-at-each-generation." Mesker & J. Damon argue that per stirpes has two distinct meanings, to wit: (1) "taking by right of representation" and (2) taking "collectively by families and not equally as individuals." Nonetheless, all three groups of appellants contend that *Trust Estate of Dwight*, 80 Hawai'i 233, 909 P.2d 561 (1995), which adopted certain provisions of the Restatement (Second) of Property (Second Restatement), is inapplicable to the instant case. Based on the foregoing, C. Haig, J. & W. Haig, and Mesker & J. Damon essentially conclude that Damon intended the stirpital root to be at the generation where there would likely be at least one living descendant at the time the trust is terminated, *i.e.*, the level of great-grandchildren.

In response, Sharon Damon Appellees contend that the four "meanings" of per stirpes, as advocated by C. Haig and

J. & W. Haig, are irrelevant because the Third Restatement "addresses these meanings in the context of intestacy statutes that have evolved as state legislatures exercise their public policy prerogative, not per stirpes provisions utilized in wills." Sharon Damon Appellees contend that the other two definitions of per stirpes, as advocated by Mesker & J. Damon, are not supported by any Hawai'i authority, and Mesker & J. Damon neglect *Dwight's* precise definition of per stirpes. Moreover, Appellees all agree that this court has already established that per stirpes has one distinct meaning, and, thus, *Dwight* has already resolved the "Restatement problem," *i.e.*, whether Hawai'i follows the First, Second, or Third Restatement with respect to the meaning of per stirpes, by adopting the pertinent provisions of the Second Restatement.

This court has recently reaffirmed that

> it is **well-established** that "per stirpes" means "by or according to root," "according to or by stock," or "by right of representation," *i.e.*, that the descendants are to take through or as representatives of a parent. *Dwight*, 80 Hawai'i 233, 235, 909 P.2d 561, 563 (1995) (citing Restatement (Second) Property (Donative Transfers) § § 25.9 and 28.2 (1988)). **Moreover, implicit in the phrase is the concept that the "root" or "stock" begins with the ancestors of those who are to take and not with the takers themselves**. *Id.*

In re Lock, 109 Hawai'i at 152-53, 123 P.3d at 1247-48 (some internal quotation marks, citation, and footnote omitted) (bold emphases added). In construing a will that was executed in 1926, this court in *Dwight* declared that, under a per stirpes distribution scheme as recognized in Hawai'i,

> *the [Second] Restatement requires the initial division to be in the first generation, whether*

> *or not there is a survivor*, and then permits the living descendants in the next generation to succeed to that share. . . .
>
> . . . .
>
> . . . *The rationale for the initial division into shares on the basis of the number of class members in the first generation below the settlor is that division of the trust corpus should be kept equal among family lines.*

Dwight, 80 Hawai'i at 236-37, 909 P.2d at 564-65 (citation omitted) (emphases added). Thus, *In re Lock* and *Dwight* acknowledge that, under Hawai'i law, per stirpes has a well-established and distinct meaning.

As previously mentioned, Damon's corpus distribution provision states: "[F]or all of my issue[15] who shall then be

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15 This court has recently confirmed that the definition of "issue" states:

"When the donor of property describes the beneficiaries thereof as 'issue' or 'descendants' of a designated person, the primary meaning of such class gift term is determined by substituting in place of the class gift term the words 'children' and 'children of children' and 'children of children of children,' etc. of the designated person[.]" [*Dwight*], 80 Hawai'i at 235-36[, 909 P.2d at 563-64] (quoting Restatement (Second) of Prop.: Donative Transfers § 25.9 (1988)); *see also* 3 Richard R. Powell, *Powell on Real Property* § 30.08 at 30-107 (2004) ("In a gift to the 'issue' or 'descendants' of a certain person, these terms are understood by reference to the definition and constructional rules for the term 'children.' Thus, the terms 'children,' 'children of children,' and so forth are substituted for 'issue' and 'descendants.' "). Indeed, "[t]he term 'issue,' shorn of any and all judicial constructions and taken in its ordinary and popular sense as used in respect to pedigree . . ., is definitely a general term synonymous with children, progeny, offspring, descendants, etc." *O'Brien v. Walker*, 35 Haw. 104, 109 (1939).

[Footnote continued on next page]

living per stirpes and not per capita." Inasmuch as Damon clearly intended a per stirpes distribution rather than a per capita distribution, the foregoing definition of per stirpes is applicable to the instant case. In accordance with *Dwight* that the stirpital root begins with the ancestors of those who are to take and not with the takers themselves, the stirpital root should not be at the level of Damon's great-grandchildren, who are the takers, but rather at the level of Damon's children, who are the ancestors of the takers. Such an interpretation leads to an equal division of the corpus among family lines as, in this case, between Damon's son Henry's line and Damon's son Samuel's line. Thus, C. Haig, J. & W. Haig, and Mesker & J. Damon's arguments with respect to the various definitions of per stirpes and their resulting conclusion that the stirpital root is at the level of Damon's great-grandchildren is without merit.

C. Haig, Mesker & J. Damon, and M. Haig next contend that, in 1996, the Hawai'i legislature rejected *Dwight's* reliance on the Second Restatement with respect to the interpretation of a class gift to issue. According to these appellants, the 1996 amendments to Hawaii's probate code adhere to the interpretation of the First Restatement rather than the Second Restatement, and, thus, the circuit court's reliance on *Dwight* was incorrect. Specifically, Mesker & J. Damon argue that HRS § 560:2-708 (Supp. 2004), quoted *infra*, relating to class gifts to issue, rejects *Dwight*'s reliance on the Second Restatement inasmuch as HRS § 560:2-708 is based on the First Restatement.

[Footnote continued from previous page]

In the Matter of Medeiros Testamentary Trust and Life Ins. Trust, 105 Hawai'i 284, 290, 96 P.3d 1098, 1104 (2004) (some brackets in original).

However, Appellees point out that C. Haig and M. Haig do not cite to any of the 1996 amendments to Hawaii's probate code to support their contention that *Dwight* is no longer controlling precedent. Snow Appellees contend that HRS § 560:2-708 applies only if the class gift to issue does not specify the manner in which the property is to be distributed. Snow Appellees maintain that, inasmuch as Damon's will "states that the distribution is to be made to the living issue 'per stirpes and not per capita,' the [w]ill's class gift specifies the manner of distribution, thereby avoiding classification as a failed class gift." Moreover, Appellees contend that C. Haig, Mesker & J. Damon, and M. Haig fail to mention that HRS § 560:2-709 (Supp. 2004), quoted *infra*, although not retroactively applicable to the instant case, defines per stirpes in a manner consistent with *Dwight*, and, thus, *Dwight* remains controlling precedent.

HRS § 560:2-708 provides that:

> If a class gift in favor of "descendants", "issue", or "heirs of the body" *does not specify the manner in which the property is to be distributed among the class members*, the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment, in such shares as they would receive, under the applicable law of intestate succession, if the designated ancestor had then died intestate owning the subject matter of the class gift.

(Emphasis added.) According to the plain language of section 560:2-708, if a class gift to issue does not specify the manner of distribution, then the applicable law of intestate succession would apply. Here, however, even assuming *arguendo* that section 560:2-708 is retroactively applicable to the trust's corpus distribution provision, Damon expressly specified the manner of distribution, *i.e.*, "per stirpes and not per capita,"

and, thus, the law of intestate succession is inapplicable to the instant case.[16] Inasmuch as section 560:2-708 does not apply to the instant class gift, *Dwight* remains controlling precedent.

Moreover, HRS § 560:2-709 provides in relevant part that:

> (c) Per stirpes. If a governing instrument executed after January 1, 1997 calls for property to be distributed "per stirpes," *the property is divided into as many equal shares as there are:*
>
> (1) *Surviving children of the designated ancestor; and*
>
> (2) *Deceased children who left surviving descendants.*
>
> Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.

(Emphases added.) We note that section 560:2-709(c) expressly states that it applies to instruments executed after

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[16] We note that, although C. Haig and Mesker & J. Damon both argue that the Hawai'i legislature rejected the applicability of *Dwight*, they take inconsistent positions with respect to whether Damon specified a manner of distribution in his trust. Although Mesker & J. Damon contend that, "on the face of the actual words used by Damon, there is a failure to 'specify the manner in which the property is to be distributed among the class members[,]'" C. Haig states that Damon described the distribution of his corpus "in a specified manner ('per stirpes and not per capita')."

January 1, 1997 and, therefore, would not apply to the instant case inasmuch as Damon executed his will in 1914. Nonetheless, section 560:2-709(c) defines per stirpes in a manner *consistent* with *Dwight*. As previously stated, *Dwight* provided that, under a per stirpes distribution scheme, "the [Second] Restatement requires the initial division to be in the first generation, whether or not there is a survivor, and then permits the living descendants in the next generation to succeed to that share." 80 Hawai'i at 236, 909 P.2d at 564 (citation omitted). Similarly, section 560:2-709(c) provides that the initial division of property is to be at the level of the designated ancestor's children, *i.e.*, the first generation, regardless of whether or not there is a survivor, as long as any deceased child left surviving descendants. Indeed, the comment to section 2-709 of the Revised Uniform Probate Code (UPC)[17] confirms this interpretation:

> Subsection (c)'s definition of "per stirpes" accords with the predominant understanding of the term. In 1993, the phrase "if any" was added to subsection (c) to clarify the point that, *under per stirpes, the initial division of the estate is made at the children generation even if no child survives the ancestor.*

Unif. Probate Code § 2-709 cmt. (amended 1993) (emphasis added). Thus, the appellants' contention that the 1996 amendments to Hawaii's probate code overruled *Dwight* is not supported by any statutory language and ignores HRS § 560:2-709(c), which confirms *Dwight's* definition of per stirpes. Accordingly, we hold that the circuit court correctly concluded that the 1996 amendments to Hawaii's probate code are not applicable to the instant case.

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[17] HRS § 560:2-709(c) is taken verbatim from section 2-709(c) of the Revised UPC.

2. Comparison of the Income and Corpus Distribution Provisions

M. Haig, C. Haig, J. & W. Haig, and Mesker & J. Damon contend that the circuit court incorrectly presumed that the corpus of the trust will be distributed in the same manner as income has been distributed. They allege that "[o]nly if identical treatment of income and corpus distribution appears to be called for in the will can courts infer a similar intent regarding both distributions." These appellants' arguments can be summarized by the following passage:

> The "glaring" difference between the two provisions refutes any assumption that Damon intended his bald and unadorned use of "per stirpes" in the corpus provision to have a meaning identical to the "by right of representation" pattern which he meticulously and repeatedly articulated for distribution of the trust income. Rather, by abandoning the "by right of representation" language he had earlier used to delineate income distribution in favor of the term "per stirpes" for the corpus, Damon evidenced an intent that corpus would be treated differently.

Appellees contend that the terms "per stirpes" and "by right of representation" are considered synonymous under *Dwight*. Moreover, Appellees allege that *Damon I's* employment of the phrase "income to my issue per stirpes" to describe the income distribution provision is further support for the notion that "by representation" and "per stirpes" mean the same thing. Finally, Sharon Damon Appellees state that "the law in Hawai'i clearly allows 'sufficient grounds for presuming' that a corpus scheme follows a similarly worded income scheme."

As previously mentioned, "it is well-established that '**per stirpes' means** 'by or according to root,' 'according to or by stock,' or '**by right of representation**,' *i.e.*, that the descendants are to take through or as representatives of a parent." *In re Lock*, 109 Hawai'i at 152-53, 123 P.3d at 1247-48 (some internal quotation marks, citation, and footnote omitted) (bold emphases added). Thus, *In re Lock* clearly reaffirms *Dwight's* proposition that "per stirpes" means "by right of representation." Moreover, other jurisdictions have also held that "per stirpes" and "by right of representation" mean the same thing. *See Lombardi v. Blois*, 230 Cal. App.2 d 191, 40 Cal. Rptr. 899, 911 (1964) ("'Per stirpes' and 'by right of representation' mean the same thing[.]" (Citations omitted.)); *Johnson v. Huntley*, 39 Wash. 2d 499, 236 P.2d 776, 778 (1951) (noting that, "[i]n the law of descent and distribution, 'taking by representation' means taking 'per stirpes'" (citations omitted)).

In this case, Damon's income distribution provision essentially provided that, after the death of Damon's widow, income is to be distributed equally among the four branches of Damon's descendants, that is, each of Damon's four children are to take a one-quarter share of the net income and, upon the death of each child, their issue to take "in succession by right of representation." In other words, income is to be distributed to Damon's issue by right of representation, and, indeed, income has been distributed in this manner since the death of Damon's widow. Presently, income is distributed equally between the two branches of Damon's descendants, one share to Damon's son Henry's line and one share to Damon's son Samuel's line, inasmuch as Henry and Samuel were the only two children that left surviving issue. On the other hand, Damon's corpus distribution provision simply provided that corpus is to be distributed to "all of my issue who shall then be living per stirpes and not per capita." In other words, the corpus is to be distributed to Damon's issue per stirpes. Inasmuch as per stirpes means by right of repre-

sentation, income and corpus are to be distributed in the same manner, *i.e.*, to Damon's issue by right of representation or per stirpes. Indeed, in *Damon I*, this court characterized Damon's income distribution provision as simply "the income to my [(Damon's)] issue per stirpes," thus, essentially expressing the view that per stirpes and by right of representation mean the same thing. 76 Hawai'i at 123, 869 P.2d at 1342. Likewise, the appellants' contention that a corpus distribution provision can be treated similarly only if it contains identical language as the income distribution provision is without merit in this case, inasmuch as Damon employed similar language in the two provisions, to wit, per stirpes and by right of representation. *See Matter of Lopez*, 64 Haw. 44, 59, 636 P.2d 731, 741 (1981) (noting that, if a settlor of a trust wanted income and corpus distribution to be treated the same, he "naturally would have used similar language"). Thus, the "glaring" distinction between the income and corpus distribution provisions is essentially, as the circuit court noted, "a distinction without a difference." See COL No. 7. Accordingly, we hold that the circuit court correctly concluded that the corpus, upon termination of the trust, will be distributed in the same manner as income has been distributed and that, therefore, the stirpital root is set at the level of Damon's children.

3. Grammatical Analysis of Damon's Will

M. Haig, C. Haig, Mesker & J. Damon, and Holt & Baldwin Families contend that Damon's capitalization of the word "And" at the start of the corpus distribution provision indicates Damon's intent to treat income and corpus differently. Appellees essentially contend that Damon's intent should not be controlled by punctuation or capitalization. In addition, Spee Appellees allege that "[n]one of the [a]ppellants point to how the capitalization supports their respective contentions."

This court has previously stated that:

> The intention of the testator as expressed in his will is not controlled by the punctuation therein and such punctuation may be disregarded where it conflicts with the manifest intention of the testator and by so doing the meaning of the will is made more obvious.

In re Deering's Estate, 29 Haw. 854, 861 (1927) (internal quotation marks and citation omitted). Other jurisdictions have similarly applied the foregoing analysis to the interpretation of the use of capitalization in wills and trusts as well. *See Wilson v. Witt*, 215 Ala. 685, 112 So. 222, 224 (1927) ("The natural sense in which words are used, as it appears from judicial inspection, prevails over punctuation and capitals[.]") (citations and internal quotation marks omitted); *Home for Incurables of Baltimore City v. Bruff*, 160 Md. 156, 153 A. 403, 411 (1931) (noting that "the meaning will not be controlled by punctuation or capitalization, if the intention of the testat[or] can otherwise be ascertained"); *Winkel v. Streicher*, 365 Mo. 1170, 295 S.W.2d 56, 59 (1956) (also noting that "the natural sense in which words are used . . . prevails over both punctuation and capitals") (citation and internal quotation marks omitted).

In the instant case, the capitalization of the word "And" does not indicate an intent to treat income and corpus distribution differently.[18] Damon's intention as expressed in his

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[18] As previously mentioned, the corpus distribution provision is contained in the fourth section of the will (see *supra* at 506-07, 128 P.3d at 819-20) and states:

> . . . **And** on the death of the last survivor of all of my children and grandchildren who shall be living at the time of my death my trustees shall hold all of my said property of every description nature or kind whatsoever and wheresoever the same may be IN TRUST

[Footnote continued on next page]

will should not be controlled by a lone capitalized word inasmuch as a sound and reasonable construction of his will clearly supports the conclusion that income and corpus are to be distributed similarly. Moreover, the word "and" is "not correctly or generally used to express an alternative, unless followed by words which clearly indicate that intent." *In re Parant's Will*, 39 Misc. 2d 285, 240 N.Y.S.2d 558, 561 (N.Y. Sur. 1963) (citation omitted). Here, the appellants are essentially proposing that the income and the corpus distribution provisions follow two entirely different distribution schemes. However, Damon's use of the word "and" was not followed by words which clearly indicate such an intent. Thus, we believe that Damon did not employ the word "and" to express alternative, or different, distribution schemes for income and corpus. Accordingly, we hold that the circuit court did not err when it concluded that Damon's use of capitalization did not demonstrate or reflect an intent to treat the distribution of corpus differently from the distribution of income.

4. Holt & Baldwin Families' Contention that a General Testamentary Plan Exists in Damon's Will that Focuses on Grandchildren

Holt & Baldwin Families assert that "Damon's 'per stirpes' direction should, consistent with his intent harmoniously indicated by all the language of his will, his general testamentary plan, and his surrounding personal circumstances, be construed to require division according to his grandchildren." Holt & Baldwin Families allege the following as Damon's testamentary plan:

[Footnote continued from previous page]

for all of my issue who shall then be living per stirpes and not per capita[.]

(Bold emphasis added.)

> [Damon] created his [t]rust to preserve most of his estate for distribution to his later descendants at some distant point long after [Damon's children's] deaths. After choosing to delay distribution to this point, it is only natural that he would look to the generation of likely first takers as the stirpes to better spread his estate among these later descendants. Under the terms of his [T]rust and his circumstances, that generation would be his grandchildren's generation.

(Footnote omitted.) Sharon Damon Appellees contend that Holt & Baldwin Families "engage in various forms of speculation regarding Damon's intent." Sharon Damon Appellees point out that Holt & Baldwin Families' "general testamentary plan" has "no basis in the [w]ill" inasmuch as this group of appellants does not point to any language in the will that Damon intended for an equalization of corpus among his grandchildren and later descendants. M. Haig, C. Haig, and J. & W. Haig contend that there is no language in the will that supports a "uniform testamentary plan" favoring Damon's grandchildren.

In *Damon I*, this court had cautioned against the use of speculation or conjecture in determining the testator's intent:

> The appellees contend that when Damon wrote his will in 1914, eight years after this court held in *Fitchie [v. Brown*, 18 Haw. 52, 1906 WL 1362 (1906),] that a testamentary trust that was to continue "for as long a period as is legally possible" did not violate the [rule against perpetuities], he may have believed that in the absence of a specific termination date the court would automatically allow the trust to continue as long as legally possible. This contention, however, is purely speculative and not based

> on any language contained in the will. Because *we "are to gather from the words of the will the intention of the testator, and to gather it not by speculation or conjecture as to what the testator may have intended, but by a sound and reasonable construction of the words which he has used,"* [*Id.*] at 70 (citation omitted), a construction of the will requiring us to find that Damon intended for the trust to continue "as long as legally possible" cannot be considered a reasonable construction.

Damon I, 76 Hawai'i at 127, 869 P.2d at 1346 (emphasis added) (some brackets omitted). Likewise, in the instant matter, a sound and reasonable construction of the words Damon used in his will do not support Holt & Baldwin Families' contention that Damon had a general testamentary plan favoring his grandchildren. On the contrary, Damon's income distribution provision places an emphasis on maintaining equal distribution of income among his children's families, with Damon's children as the stirpital root, not Damon's grandchildren. Indeed, Holt & Baldwin Families' allegation that it would be "only natural that [Damon] would look to the generation of likely first takers as the stirpes to better spread his estate among these later descendants" is purely speculative and not based on any language contained in the will. Thus, based on the foregoing, Holt & Baldwin Families' contentions are without merit. Accordingly, we hold that the circuit court correctly rejected Holt & Baldwin Families' arguments that the corpus distribution provision should be "harmonized" with the will and that the stirpital root begins at the level of Damon's grandchildren.

5. Law of Intestate Succession

Finally, M. Haig argues that the circuit court erred when it concluded that Hawaii's intestacy law did not apply to the corpus distribution provision inasmuch as Damon failed to

direct that there ever be a corpus distribution, and, thus, Damon's will is silent as to the disposition of corpus at termination. Consequently, M. Haig maintains that Damon's will fails to completely dispose of his property and that, therefore, Hawaii's intestacy statute governs the distribution of the failed gift.

Sharon Damon Appellees counter that M. Haig's contention that Damon died partially intestate ignores this court's long-standing presumption against partial intestacy. Sharon Damon Appellees assert that M. Haig's argument "ignores the language of Damon's [w]ill requiring that the [t]rust be distributed 'for all of my issue who shall then be living per stirpes and not per capita,' a clear description of the class members to receive corpus." Both Snow Appellees and Spee Appellees also contend that Hawaii's intestacy statute should not apply to the corpus distribution provision because Damon expressly provided a manner of distribution as this court already recognized in *Damon I*.

In *Damon I*, this court recognized that:

> Damon directed that upon the death of the last measuring life the property be held only for his "issue who shall then be living." On its face, that language limits the beneficiaries to persons alive at that time and excludes any issue born after the death of the last measuring life. By precisely defining the beneficiaries as those issue living at the time of the death of the last measuring life, placing no limits on the duration of their status as beneficiaries, and failing to specify any subsequent beneficiaries, Damon's instructions appear to direct transfer of the estate in trust for the specified beneficiaries absolutely.

76 Hawai'i at 125, 869 P.2d at 1344 (citation omitted). Based on the foregoing and viewing Damon's will as a

whole, *Damon I* held that there were "strong indications that Damon intended that the trust terminate upon the death of the last measuring life." *Id.* at 126, 869 P.2d at 1345.

Given the holding in *Damon I*, it is difficult to comprehend that M. Haig continues to adhere to the notion that Damon's will is "silent" as to whether he ever intended a distribution of the corpus. Nevertheless, as previously stated, Damon expressly specified the manner of distribution, *i.e.*, "per stirpes and not per capita," and, thus, the law of intestate succession is inapplicable to the instant case. Moreover, the contention that Damon's will fails to completely dispose of his property is contrary to Hawaii's public policy that "the law abhors intestacy and presumes against it," *Matter of Ikuta's Estate*, 64 Haw. 236, 245, 639 P.2d 400, 406 (1981) (internal quotation marks and citation omitted), inasmuch as there is language in Damon's will that expressly provides for a manner of distribution. Accordingly, we hold that the circuit court correctly concluded that the intestacy laws of Hawai'i are inapplicable to the instant case.[19]

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[19] Appellees also raise on appeal that M. Haig is judicially estopped from arguing that: (1) income and corpus should be distributed differently; (2) the corpus distribution provision does not provide for distribution of the trust; and (3) Damon's will is ambiguous as to which generation should serve as the stirpital root. Appellees contend that inasmuch as M. Haig takes inconsistent positions in *Damon I* and in the present appeal, M. Haig has "blown hot and cold" during the course of litigating the interpretation of Damon's will. However, inasmuch as many of the appellants raise similar and overlapping arguments on appeal, this court need not address this issue.

IV. CONCLUSION

Based on the foregoing, we affirm the circuit court's June 21, 2002 amended judgment in favor of Appellees.

APPENDIX B

Of Counsel:

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

TRUST	) P. NO. 6664;
	) EQUITY NO. 2816-A
CREATED UNDER	)
	) FINDINGS OF FACT, CON-
THE WILL OF	) CLUSIONS OF LAW AND
	) ORDER INTERPRETING
SAMUEL M. DAMON,	) THE WILL OF SAMUEL
	) MILLS DAMON AS IT RE-
Deceased	) LATES TO DISRIBUTION
	) OF TRUST CORPUS UPON
	) TERMINATION OF THE
	) SAMUEL MILLS DAMON

) TRUST AND INSTRUCTING
) TRUSTEES AS TO DETER-
) MINATION OF STIRPES
)
) Date: November 20, 1998
) Time: 1:30 p.m.
) Judge: Virginia Lea Crandall
)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER INTERPRETING THE WILL OF SAMUEL MILLS DAMON AS IT RELATES TO DISRIBUTION OF TRUST CORPUS UPON TERMINATION OF THE SAMUEL MILLS DAMON TRUST AND INSTRUCTING TRUSTEES AS TO DETERMINATION OF STIRPES

This matter came on for heating on November 20, 1998. All interested persons and appropriate parties were duly served and accorded the opportunity to appear before the Court in person or through their representatives. The Honorable Virginia Lea Crandall presided. CARROLL S. TAYLOR appeared for Michael E. Haig; A. JAMES WRISTON, JR. and RONDA K. KENT appeared for Joan Damon Haig; WARREN PRICE, Ill with WILLIAM H. SOSKIN and SCOTT CARTER, Pro Hac Vice, appeared for Sharon M. Damon, Siddhartha Damon and Shawnna Sorenson; DANIEL H. CASE appeared for Harriet Baldwin, Frances Damon Holt, Peter Baldwin, Katherine Achaval, Bennet Baldwin, Allison Holt Gendreau, Melanie Holt and Daniel Holt; MARY JANE CONNELL appeared for the Trustees, along with James Whitman, Executive Secretary of the Estate of Samuel M. Damon; ANTHONY S. CHAN appeared for Heidi Ann Snow, Julia Ann Snow and Frank Edward Snow; MERVYN S. GERSON and KRISTIE K. CRUZ appeared for Samuel E. Damon, Samuel Renny Damon, Pia Damon Spee, Julio Damon Spee, Miles Samuel Spee and Philip Edward Spee; ARTHUR B. REINWALD appeared for Christo-

pher Damon Haig; GEORGE W. VAN BUREN appeared for John Philip Damon; RANDALL M. L. YEE appeared for Wendy A. Haig. No other appearances were made.

Having heard and considered the arguments of counsel, together with the Petition and Responses thereto, and having taken the matter in question under advisement, the Court, pursuant to that certain Minute Order dated May 18, 1999, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Samuel M. Damon (the "testator") executed his Last Will and Testament (the "Will") on November 10, 1914, at which time three of his four children, Mary, Henry F. and Douglas, were still living. His fourth child, Samuel E. Damon, had died on September 27, 1904, survived by an infant son (Gordon) who died in 1905 and by three other children, Samuel R., Esmee and Heather, who were alive upon the execution of the Will. Samuel M. Damon also had one additional grandchild, Harriet, who was then the only child of Henry F.

2. On July 1, 1924, Samuel M. Damon (who had been declared incompetent in 1918) died testate survived by his widow and three of his children (Mary, Henry F. and Douglas). Two grandchildren (Esmee and Heather), children of Samuel E., both of whom had been alive upon the execution of the Will, predeceased Samuel M. Damon without issue. Samuel R. (sibling of Esmee and Heather and the only surviving child of Samuel E) and Harriet (daughter of Henry F.), both living upon the execution of the Will, survived Samuel M. Damon, as did three additional children of Henry F. born after the Will was executed. Neither Mary or Douglas had children at their father's death, and both ultimately died without issue.

3. A portion of the income of the trust created under the terms of the Will (the "Trust") has been and continues to be

used for the maintenance of Moanalua Gardens. Following the death of the surviving widow of Samuel M. Damon and the deaths of Mary and Douglas Damon without issue, the Trustees of the Damon Estate have distributed the income remaining after these maintenance costs and other expenses of administration (the "Net Income") without legal challenge one-half (1/2) to the issue of Samuel E. Damon, by representation in each generation, and one-half (1/2) to the issue of Henry F. Damon, by representation in each generation.

4. In *Trust Created Under Will of Damon*, 76 Haw. 120, 869 P.2d 1339 (1994) ("*Damon I*"), it was determined that the Trust will terminate upon the death of the last survivor of Samuel M. Damon's three now living grandchildren, Harriet Baldwin, Frances Holt and Joan Haig, and as a result of that determination, upon termination of the Trust, the corpus shall be distributed to "all of my issue who shall then be living per stirpes and not per capita".

5. Michael Haig, a great-grandchild of Samuel M. Damon, filed the aforementioned Petition, seeking to have the Court interpret the language of the Will and instruct the Trustees as to where the division of the stirps should be made with respect to the distribution of corpus upon termination of the Trust. Specifically, Petitioner seeks a determination as to whether Samuel M. Damon intended that the stirps start at the level of (1) Samuel M. Damon's children, (2) Samuel M. Damon's grandchildren or (3) Samuel M. Damon's great-grandchildren.

CONCLUSIONS OF LAW

It is well established under Hawai'i law that the intention of the testator shall prevail in the interpretation of a will and that intent must be ascertained from the will taken as a whole. *Trust Estate of Dwight v. Keolanui*, 80 Haw. 233, 234-35, 909 P.2d 561, 562-63 (1995); *Damon I*, 76 Haw. at 124, 869 P.2d at 1343.

Samuel M. Damon's intent, as can be ascertained from Paragraph Four of the Will, was that one-fourth of the Net Income of the Trust be payable to each of his three then living children, identified by name, and upon each of their deaths to their respective issue "in every such case taking in succession by right of representation". Paragraph Four also provides that the remaining one-fourth of the Net Income of the Trust shall be paid to the children of the testator's deceased son, Samuel E., with the issue of any deceased child of Samuel E. taking the share of his or her deceased parent. Further, when all of Samuel E.'s children shall have died, the Net Income of the Trust designated for them shall be paid to the then living issue of Samuel E. (*i.e.*, his grandchildren or more remote descendants) "by right of representation". Paragraph Four also contemplates the death of any of Samuel M. Damon's children without issue or the failure of any of the anticipated family lines, providing that the share of the Trust designated for such a line shall be added to the shares of the remaining children or their issue. There are no provisions in the Will to provide for equalization of income among the testator's grandchildren or more remote issue upon the death of his last child or at any other time thereafter.

The intent of Samuel M. Damon with respect to the principal of the Trust, as again expressed by Paragraph Four, was that it be distributed upon termination (which the Supreme Court of Hawaii in *Damon I* determined to be at the death of the last grandchild of Samuel M. Damon) to "all of my [testator's] issue who shall then be living per stirpes and not per capita". There is no ambiguity in the Will as to the intent of Samuel M. Damon to avoid a per capita distribution of the Trust principal. The direction in Paragraph Four to distribute "per stirpes and not per capita" precludes any interpretation of the Will that would permit the descendants of Samuel M. Damon to take in their own right rather than by representation.

The Holt and Baldwin families have argued that this Court should "harmonize" the principal distribution provision with the Will as a whole and find that the stirps begin at the level of the grandchildren of the testator. The Court is not persuaded by this argument.

Petitioner, Christopher Haig and Joan Damon Haig have argued that the language of the Will evidences Samuel M. Damon's intent that the stirps for calculating the distribution of the principal of the Trust should be found at the first generational level at which there are living issue who share in the principal distribution. That would likely result in the stirps being set at the level of the testator's great-grandchildren. This argument is based in part on Samuel M. Damon's use of different language in directing disposition of the principal ("per stirpes" and among "all of my issue who shall then be living") than he used for directing distribution of income ("by right of representation" among the issue of named children) and on the theory that if Samuel M. Damon had intended the same distribution of both principal and income, he would have used the same language in directing their disposition.

While differing words are indeed used, the Court concludes that they do not evidence a difference in intent or meaning. In fact, the Court concludes that the words "per stirpes" as used with respect to the distribution of principal and the words "by right of representation" as used with respect to the distribution of net income mean the same thing. A similar argument regarding the use of differing language was addressed in *Lombardi v. Blois*, 40 Cal. Rptr. 899, 911 (Ct. App. 1964), wherein the appellants argued that there was a shift in language and that the testator had a different intention when using the words "per stirpes" in a deed of trust and using the phrase "by right of representation" in a will. The California Court of Appeals disagreed with this argument and held that "[p]er stirpes' and 'by right of representation' mean

the same thing". *Id.*; *see also In re Estate of Tjaden*, 402 N.W.2d 288, 293 (Neb. 1987) ("'By right of representation' means a devisee is entitled to take or receive a share of an estate on a 'per stirpes' basis."); *Mercantile Trust & Savings Bank v. Rogers*, 124 N.E.2d 683, 686 (Ill. Ct. App. 1955) ("'Per stirpes' means by representation."); *Matter of Will of Griffin*, 411 So. 2d 766, 768 (Miss. 1982) ("The two Latin words, 'per stirpes', are defined in Black's Law Dictionary, Fourth Edition, as meaning, 'By roots or stocks; by representation.'").

One common method of determining the meaning of "per stirpes", in cases where the first takers are descended from the prior income takers, is to presume that the principal upon termination will be distributed in the same manner as income was distributed prior to termination.[1] Despite arguments that Samuel M. Damon intended the income and principal of the Trust to be distributed differently because of differing language and punctuation in the income distribution clause and residuary distribution clause, the Court is not persuaded that any language, punctuation (or lack thereof) or capitalization in the Will demonstrates or reflects an intent to treat the distribution of corpus differently from the distribution of income. The differing language, capitalization and punctuation cited reflect a distinction without a difference.

The Hawaii Supreme Court used similar reasoning in *Trust Estate of Dwight*, 80 Haw. 233, 908 P.2d 561. In that

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[1] *Trust Estate of Dwight*, 80 Haw. at 238, 909 P.2d at 566; *see also Bank of England. NA. v. McKennan*, 477 N.Ed.2d 170 (Mass. App. Ct. 1985); *Matter of Wyman*, 308 N.W.2d 311 (Minn. 1981); *Weller v. Sokol*, 318 A.2d 193 (Md. 1974); *In re Morton's Estate*, 222 A.2d 185 (N.J. 1966); *Lombardi v. Blois*, 40 Cal. Rptr. 899 (Ct. App. 1964).

case the testator had provided for trust income to be distributed to his children (one daughter and two adopted grandchildren) per stirpes until all of them had died. The corpus was then to be distributed to "the issue of my said adopted children as shall then be living in equal shares per stirpes." The Court held that the stirpital root"begins with the ancestors of those who are to take and not with the takers themselves." *Id.* at 235, 909 P.2d at 561. In reaching its conclusion, the Court noted that the testator "intended distribution of the trust corpus to parallel income distribution." *Id.* at 238, 909 P.2d at 566.

Many courts have wrestled with the meaning of "per stirpes" in wills and have relied on American cases involving trusts for a testator's own children to determine the testator's issue. Absent very unusual facts, they almost uniformly find the stirps at the generation of testator's children. For example, *In re Morton's Estate*, 222 A.2d 185 (N.J. 1966), which was cited with approval in *Trust Estate of Dwight*,[2] involved a residuary estate divided "into equal shares for my issue who shall survive my said wife, such division to be made in equal shares per stirpes, however, and not per capita. . ." 222 A.2d at 186. At the time the will was executed, testator in

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[2] *See also Rhodes v. First Alabama Bank, Montgomery*, 699 So. 2d 204 (Ala. Civ. App. 1997) (citing *Trust Estate of Dwight*); *First Mini Bank v. Pritchard*, 595 N.E.2d 728 (Ill. App. Ct. 1992) (citing Second Restatement of Property); *Matter of Wyman*, 308 N.W.2d 311 (Minn. 1981); *Weller v. Sokol*, 318 A.2d 193 (Md. 1974); *Teller v. Kaufman*, 426 F.2d 128 (8th Cir. 1970); *In Re Careaga's Estate*, 393 P.2d 415 (Cal. 1964); *Lombardi v. Blois*, 40 Cal. Rptr. 899 (Ct. App. 1964); *Ballenger v. McMillan*, 106 A.2d 109 (Md. 1954); *In Re Marshall's Estate*, 103 A.2d 420 (Pa. 1954); *O'Reilly v. Jackson*, 269 S.W.2d 631 (Mo. 1954); *Bradlee v. Converse*, 60 N.E.2d 345, 346 (Mass. 1945); *In Re Robins' Estate*, 38 F. Supp. 468 (D.C. 1941).

Morton had one living daughter and one predeceased daughter, who was survived by three children. Thereafter, the daughter who was living when the will was executed predeceased the testator, leaving four children.

The issue before the *Morton* court was whether there should be seven equal shares or two equal shares. The court concluded that there should be two equal shares, one divided three ways and the other divided four ways, by relying in part on the "normal expectation" that the testator's second daughter would have survived him, adding that "[o]f significance, we think, in further evidencing this fundamental intent are the additional provisions, previously adverted to, requiring that branch devolution be maintained throughout the life of the trusts." *Id.* at 188.

When Samuel M. Damon provided in Paragraph Four of the Will that the principal of the Trust would be distributed upon its termination (as determined in *Damon I*) to "all of my issue who shall then be living per stirpes", he similarly intended that the stirps should be set at the level of his children.

Petitioner has argued that the new Uniform Probate Code, Hawaii Revised Statutes ("HRS") §§ 560 *et. seq.*, which became effective January 1, 1997, provides the intestacy law as the default rule in interpreting clan gifts. HRS § 560:2-708 follows an intestacy scheme of distribution for class gifts to issue. HRS §§ 560:2-103 ("share of heirs") and 560:2-708 do not apply to the class gift herein because Samuel M. Damon specified the manner of his intended distribution. The Uniform Probate Code provisions apply only when the testamentary instrument is silent as to the manner of distribution.

To the extent that these Conclusions of Law constitute Findings of Fact, they will be so deemed_

IT IS 'THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. This Court has jurisdiction over the Petition and over all parties herein.

2. The Petition is granted.

3. For purposes of distribution of the corpus upon termination of the Trust, the Court finds and concludes that the stirps are the ancestors of the takers and not the first takers and that the stirps are the children of Samuel M. Damon as Samuel M. Damon is the common ancestor from whom representation begins.

4. The Trustees are instructed that for purposes of distribution of the corpus upon termination of the Trust, the division of the stirps shall be made at the level of the children of Samuel M. Damon

DATED: Honolulu, Hawaii

VIRGINIA LEA CRANDALL

JUDGE OF THE ABOVE-ENTITLED COURT

Approved as to Form:

CARROLL S. TAYLOR Attorney for Michael E. Haig	/s/ A. JAMES WRISTON, JR. RONDA K. KENT Attorneys for Joan Damon Haig
/s/ WARREN PRICE, III WILLIAM H. SOSKIN SCOTT CARTER	DANIEL H. CASE

Attorneys for Sharon Damon, Siddhartha Damon and Shawnna Sorenson

Attorneys for Harriet Baldwin, Frances Damon Holt, Peter Baldwin, Katherine Achaval, Bennett Baldwin, Allison Holt, Gendreau Melanie Holt and Daniel Hold

/s/

MARY JANE CONNELL
Attorney for Trustees

ANTHONY S. CHAN
Attorney for Heidi A. Snow, Julia S. Snow and Frank E. Snow

/s/

ARTHUR B. REINWALD
Attorney for Christopher Damon Haig

GEORGE W. VAN BUREN
Attorney for John Phillip Damon

/s/

RANDALL M. L. YEE
Attorney for Wendy A. Haig

TRUST CREATED UNDER THE WILL OF SAMUEL M. DAMON, DECEASED.; P. NO. 6664; EQUITY NO. 2816; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER INTERPRETING THE WILL OF SAMUEL MILLS DAMON AS IT RELATES TO DISTRIBUTION OF TRUST CORPUS UPON TERMINATION OF THE SAMUEL MILLS DAMON TRUST AND INSTRUCTING TRUSTEES AS TO DETERMINATION OF STIRPS.

APPENDIX C

LAW OFFICES OF
TAYLOR, LEONG & CHEE

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

TRUST CREATED UNDER THE WILL OF SAMUEL M. DAMON, Deceased	P. NO. 6664; EQUITY NO. 2816-A AMENDED JUDGMENT RE: PETITION SEEKING AN INTERPRETATION OF THE WILL OF SAMUEL MILLS DAMON AS IT RELATES TO THE DISTRIBUTION OF THE CORPUS AT THE TERMINATION OF THE TRUST AND INSTRUCTING TRUSTEES AS TO DETERMINATION OF STIRPS Date: November 20, 1998 Time: 1:30 p.m. Judge: Virginia Lea Crandall

AMENDED JUDGMENT RE: PETITION SEEKING AN INTERPRETATION OF THE WILL OF SAMUEL MILLS DAMON AS IT RELATES TO THE DISTRIBUTION OF THE CORPUS AT THE TERMINATION OF THE TRUST AND INSTRUCTING TRUSTEES
AS TO DETERMINATION OF STIRPS

Pursuant to the A) *Order Denying with Prejudice the Petition for Court Appointment of Attorneys to Brief the Issues Raised in the Petition Seeking an Interpretation of the Will of Samuel Mills Damon as It Relates to the Distribution of the Corpus at the Termination of the Trust and Denying without Prejudice as to (1) Requiring Beneficiaries to Pay for the Fees and Costs of Attorneys They Retain and (2) the Estate Being Responsible for One Reasonable Fee per Position (the "Fee Bearing Order")*, which was filed herein on June 26, 1998; B) *Order Regarding Michael E. Haig's Petition Filed Herein on April 8, 1998 Seeking an Interpretation of the Will of Samuel Mills Damon as it Relates to the Distribution of the Corpus at Termination of the Trust* (the "Order Seeking Interpretation of the Will") which was filed herein on August 27, 1998; C) *Findings of Fact, Conclusions of Law and Order Interpreting the Will of Samuel Mills Damon as it Relates to Distribution of Trust Corpus Upon Termination of the Samuel Mills Damon Trust and Instructing Trustees as to Determination of Stirps (the "Per Stirpes Order") which was filed on May 24, 2000*; and D) *Order Granting In Part and Denying In Part: (1) Joan Damon Haig's Petition for Court's Instructions to the Trustees Regarding Reimbursement of Attorneys' Fees, Etc.; (2) Petition By Christopher Damon Haig for Reimbursement of Reasonable Attorneys' Fees; (3) Wendy A. Haig's Petition for Reimbursement of Reasonable Attorneys' Fees and Costs, Etc.; (4) Samuel E. Damon, Samuel Renny Damon, Pia Damon Spee, Julio Damon Spee, Miles Samuel Spee and Philip Edward Spee's Request for Reimbursement of Reasonable Attorneys' Fees; (5) Sharon Damon, Shawnna Sorenson and Siddhartha*

Damon's Petition for Reimbursement of Reasonable Attorneys' Fees and Costs; (6) Michael E. Haig's Request for Reimbursement of Reasonable Attorneys' Fees and Costs; and (7) Declaration of Daniel H. Case In Support of Request for Attorneys' Fees and Costs (the "Fee Order") which was filed herein on June 19, 2001, final judgment is hereby entered as follows:

A. *Fee Bearing Order*

1. The request contained in the *Petition for Court Appointment of Attorneys to Brief the Issues Raised in the Petition Seeking an Interpretation of the Will Of Samuel Mills Damon as It Relates to the Distribution of the Corpus at the Termination of the Trust and to Have Beneficiaries Pay for the Legal Expenses of Attorneys They Retain* (the "Fee Bearing Petition"), which was filed herein on April 22, 1998, for the Court to appoint three attorneys, one to represent the interests of each of the three positions outlined in the *Petition for Instructions Seeking An Interpretation of the Will of Samuel Mills Damon as It Relates to the Distribution of the Corpus of Termination of the Trust* (the "Per Stirpes Petition"), which was filed herein on April 8, 1998, is denied with prejudice.

2. The request contained in the Fee Bearing Petition that the Court order that the Estate of Samuel M. Damon shall not be required to pay for fees and costs of attorneys hired by any parties/beneficiaries but such fees shall be paid by the party/beneficiary retaining said counsel is denied without prejudice, such matter to be determined after the hearing on the merits of the Per Stirpes Petition.

3. The request contained in the Fee Bearing Petition for the Court to determine that, if the Court determines that the fees are in the best interests of the trust estate as a whole, the Estate will be responsible for only one reasonable fee per position, with the Court dividing such fee among any counsel appearing herein is denied without prejudice, such matter to

be determined after the hearing on the merits of the Per Stirpes Petition.

B. ***Order Seeking Interpretation of the Will***

4. The claims of Amelia K. Cora, Kalani Hatchie and Kealoha Kuhia (the "Claimants served by Publication") to the lands of the estate of Samuel Mills Damon, deceased, are denied as being beyond the jurisdiction of the Court in this proceeding and as being unresponsive, irrelevant and immaterial to the matters properly raised in this proceeding, and the Claimants Served by Publication are hereby determined not to be interested persons herein.

5. Petitioner's request for default of all persons served by publication is granted as to all such persons but is denied as to all persons whose identity and address is known (the "Interested Nonappearing Beneficiaries") on condition that (a) the Interested Nonappearing Beneficiaries shall comply strictly with the briefing schedule and other orders contained in the Order Seeking Interpretation of the Will, (b) service of pleadings on the Interested Nonappearing Beneficiaries need not be made by the appearing parties, (c) the Trustees shall use their best efforts to keep the Interested Nonappearing Beneficiaries informed of these proceedings by forwarding to them copies of all pleadings served on the Trustees, and (d) the Interested Nonappearing Beneficiaries may at any time, either orally or in writing, join in a position advanced by a party appearing herein, but such Interested Nonappearing Beneficiaries shall not be permitted to submit memoranda unless they have strictly adhered to the briefing schedule.

6. Petitioner's request for entry of an order holding that each stirp constitutes a class is granted such that each person who appears and asserts a position will virtually represent any minor or unborn who might, by claiming through that person, at any time wish to assert a position, and, as a result, no Guardian ad Litem needs to be appointed.

7. Petitioner's request for entry of an order permitting discovery under the Hawai'i Rules of Civil Procedure is granted in part such that discovery from the Trustees is permitted under "MCP Rules 31, 33, 34, and 36, on condition that (a) all discovery requests and responses thereto be simultaneously served on the Trustees and all appearing parties, and (b) the timing of such discovery requests be such that the responses thereto are due not later than October 23, 1998, and it is denied without prejudice as to any other discovery.

C. *Per Stirpes Order*

8. For purposes of distribution of the corpus upon termination of the Trust, the stirps are the ancestors of the takers and not the first takers, and that the stirps are the children of Samuel M. Damon as Samuel M. Damon is the common ancestor from whom representation begins.

9. The Trustees are instructed that for purposes of distribution of the corpus upon termination of the Trust, the division of the stirps shall be made at the level of the children of Samuel M. Damon.

C. *Fee Order*

10. The Trust will reimburse Petitioners in (1) Joan Damon Haig's Petition for Court's Instructions to the Trustees Regarding Reimbursement of Attorneys' Fees from Trust Funds, which was filed herein on June 8, 2000; (2) Petition By Christopher Damon Haig for Reimbursement of Reasonable Attorneys' Fee, which was filed herein on June 27, 2000; (3) Samuel E. Damon, Samuel Renny Damon, Pia Damon Spee, Julio Damon Spee, Miles Samuel Spee and Philip Edward Spee's Request for Reimbursement of Reasonable Attorneys' Fees, which was filed herein on July 10, 2000; (4) Wendy A. Haig's Petition for Reimbursement of Reasonable Attorneys' Fees and Costs from the Trust, which was filed herein on July 13, 2000; (5) Sharon Damon, Shawnna Sorenson and Siddhartha Damon's Petition for Re-

imbursement of Reasonable Attorneys' Fees and Costs, which was filed herein on August 21, 2000; (6) Michael E. Haig's Request for Reimbursement of Reasonable Attorneys' Fees and Costs, which was filed herein on August 21, 2000; and (7) Declaration of Daniel H. Case In Support of Request for Attorneys' Fees and Costs, which was filed herein on August 21, 2000 (referred to collectively as the "Fee Petitions") for Attorneys' fees and costs which the Court deems to be reasonable, necessary and appropriate under the circumstances.

11. Legal services rendered and costs incurred in connection with the issue raised in the Fee Bearing Petition of whether one attorney should be appointed to represent each position at which stirps could be measured, was of benefit to the Court and the Estate.

12. Reimbursement from the Trust will be made only for time entries and costs incurred in the preparation of pleadings filed in, and the court appearances for, the *Petition Seeking an Interpretation of the Will of Samuel Mills Damon as it Relates to the Distribution of the Corpus at Termination of the Trust*, which was filed herein on April 8, 1998 (the "Per Stirpes Petition") and the Fee-Bearing Petition.

13. No reimbursement from the Trust will be made for tees incurred in the preparation or defense of any of the Fee Petitions.

14. No reimbursement will be made for services rendered or costs incurred prior to the filing of the Per Stirpes Petition on April 8, 1998 except for Michael E. Haig's Fee Petition.

15. No reimbursement will be made for services rendered or costs incurred subsequent to the filing of the Per Stirpes Order.

16. No reimbursement will be made for fees or costs incurred for retention, representation, or conflict waiver mat-

ters, including fees and costs related to pro hac vice appearances.

17. Computer-generated research costs for LEXIS, NEXIS and Westlaw are disallowed as costs taxable to either another side or the Trust, as consistent with the First Circuit practice.

18. Reimbursement is to be made from Trust corpus.

19. Although Joan Haig is an income beneficiary, she does not have standing in this matter and her petition for fees is denied. However, to the extent that counsel for Joan Haig provided assistance to the Court, the Court awards reimbursement in the amount of $35,000.00 to reflect the value provided to the Court and to the Estate.

20. With respect to the Christopher Damon Fee Petition, fees and costs of $68,358.46 are approved for reimbursement.

21. With respect to the Wendy Haig Fee Petition, fees and costs of $39,819.44 are approved for reimbursement, which amount excludes items related to the accounting.

22. With respect to the Michael Haig Fee Petition, fees and costs of $160,719.48 are approved for reimbursement, which amount includes fees incurred from January 1998 through the filing of the Per Stirpes Petition.

23. With respect to the Damon-Spee Fee Petition, fees and costs of $82,332.45 are approved for reimbursement, which amount excludes items related to the accounting.

24. With respect to the Damon-Sorenson Fee Petition, fees and costs of $91,672.00 are approved for reimbursement to the Price, Okamoto, Himeno and Lum firm; fees and costs of $59,849.72 are approved for reimbursement to the Soskin firm; and fees and costs of $30,195.00 are approved for reimbursement to the Carter firm. These amounts exclude annual disciplinary fees and costs related to *pro hac vice* coun-

sel attending a hearing, since such fees and costs are not reimbursed to Hawaii counsel either by the other party or the trust, as such costs are just part of being an attorney.

25. With respect to the Holt-Baldwin Fee Petition, fees of $111,154.05 are approved for reimbursement, which includes an adjustment to the hourly rates for Mr. Lombardi and Mr. Rinesmith to reasonable rates of $250.00 per hour.

26. There being no just reason for delay and the foregoing judgment fully addressing all claims raised in the Per Stirpes Petition, the Fee Bearing Petition and the Fee Petitions, and binding all persons with an interest in the proceedings, both appearing and nonappearing, the Court expressly directs that, pursuant to Rule 34(a) of the Hawaii Probate Rules, judgment is hereby entered in the manner provided by Rules 54(b) and 58 of the Hawaii Rules of Civil Procedure. This judgment does not address claims raised in any other petitions brought in Probate No. 6664 or Equity No. 2816-A.

Dated: Honolulu, Hawaii JUN 20, 2002

COLLEEN K. HIRAI

Judge of the above entitled Court

P. No. 6664; Equity No. 2816-A; *Trust Created Under the Will of Samuel M. Damon, Deceased; Amended Judgment Re: Petition Seeking an Interpretation of the Will of Samuel Mills Damon as It Relates to the Corpus at Termination of the Trust and Instructing Trustees as to Determination of Stirps.*

APPENDIX D

No. 25216

IN THE SUPREME COURT OF THE STATE OF HAWAII

PROBATE NO. 6664 IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON, Deceased.	P. NO. 6664; EQUITY NO. 2816-A APPEAL FROM THE JUDGMENT RE PETITION SEEKING AN INTERPRETATION OF THE WILL OF SAMUEL MILLS DAMON AS IT RELATES TO THE DISTRIBUTION OF THE CORPUS AT TERMINATION OF THE TRUST AND INSTRUCTING TRUSTEES AS TO DETERMINATION OF STIRPS
EQUITY NO. 2816-A TRUST CREATED UNDER THE WILL OF SAMUEL MILLS DAMON Deceased.	FIRST CIRCUIT COURT Honorable Virginia Lea Crandall Judge

APPELLANT, CHRISTOPHER DAMON HAIG'S OPENING BRIEF

and

CERTIFICATE OF SERVICE

JOHN L. MCDERMOTT #1710
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Attorney for Appellant
CHRISTOPHER DAMON HAIG

* * * *

surviving at the time of distribution with the members of subsequent generations taking, if at all, by way of representation. *See*, Londo H. Brown, THE TESTATOR'S INTENT – VAGUE MEANINGS OF CLEAR SOUNDING PHRASES, 69 W. VA. L. Rev. 133, 148 (1967).

Law at Testator's Death. In Hawaii, a Will speaks from the time of the testator's death, and what is spoken is subject to the laws in force at that time. *In re Estate of Christian*, 65 Haw. 3944, 397, 652 P.2d 1137, 1140 (1982); *In re Estate of Searl*, 72 Haw. 222, 811 P.2d 828 (1991). The focus is not on today's law. The proper focus is the law at Mr. Damon's death in 1924.

No Retroactive Legislative Effect After Testator's Death. Upon the death of the testator, vested property rights become fixed. Accordingly, the law which is in force at testator's death controls, and the legislature cannot change the law so as to affect a will executed by a testator who died before such law was enacted. *People v. Powers*, 147 N.Y. 104, 41 N.E. 432 (1895); *Rowlett v. Moore*, 252 Ill 436, 96 N.E. 835 (1911); WILLIAM J. BOWE & DOUGLAS H. PARKER,

PAGE ON THE LAW OF WILLS § 3.10 (rev. ed. Supp. 2002).

The Hawaii Supreme Court has given strict instruction not to nullify retroactively the intent of the Trustor:

> ". . . This court is well-aware of the principle of law that no statute can operate retroactively upon the intention of a trustor already effectual, so as to turn the distribution of the trust into a different channel from that selected by the trustor, nor put into the power of anyone having an opposing interest to change, enlarge or prevent the happening of a contingency upon which, as indicated by the trustor, the distribution of the corpus of the trust depends." *O'Brien v. Walker*, 35 Haw. 104, 112 (1939).

Retroactive Effect of Judicial Decisions Upon Prior Wills. Because of the retroactive effect of a change in case law, the courts are very reluctant to depart from *stare decisis* where commercial transactions are concerned or where property rights are involved, or where in matters of property, persons have acted in reliance upon the existing law. WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 3.9 (rev. ed. Supp. 2002); *Stockton v. Dundee Mfg. Co.*, 22 N.J. Eq. 56, 57 (1871 N.J. Super. LEXIS 26) (*A change by statute is only for the future. A change by decision is retrospective.*); *Cardozo*, THE PARADOXES OF LEGAL SCIENCE 70-72 (1928). [Emphasis added].

As stated by the United States Tenth Circuit Court:

> "A rule established by judicial decisions construing statutes regulating descent and distribution is a rule of property. The rule *stare decisis* applies with peculiar force and strictness

> to decisions which have established a rule of property. Such rules should be certain and stable and when once established should not be disturbed, even though a different conclusion might be reached if the question were an open one. The reasons are obvious. Property is acquired and sold in reliance on such rules. *Legislative changes operate prospectively; judicial decisions are retrospective.* A departure from an established rule of property may destroy important rights or titles acquired on the faith thereof. Men may adapt themselves to rules lacking in technical correctness, but *shifting rules* (which are retroactive rather than prospective only) *afford them neither protection nor safety.*" *Dunn v. Micco*, 106 F.2d 356, 359 (10th Cir. 1939) WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 3.9 (rev. ed. Supp. 2002). [Emphasis added].

The Damon Probate Court, below, held as controlling precedent to determine the distribution of the corpus upon the termination of the Damon Estate Trust, the case, *Trust Estate of Dwight*, 80 Haw. 233, 909 P.2d 561 (Haw. 1995). The *Dwight* case held as controlling the 1988 RESTATEMENT (SECOND) OF PROPERTY, (Donative transfers) §§ 25.9 and 28.2. The 1988 RESTATEMENT (SECOND) OF PROPERTY and legislation based upon it would not apply retroactively to the 1914 Damon Will. By taking the non-retroactive 1988 RESTATEMENT (SECOND) and pulling the RESTATEMENT (SECOND) through the eye of the needle of a retroactive judicial decision, the Probate Court applied 86 years retroactively the 1988 RESTATEMENT (SECOND) TO THE 1914 Damon will, thereby nullifying the 1914 intent of the Testator, Mr. Damon. The Probate Court committed Reversible Error.

A.1. BASED ON THE WORDING OF THE DAMON WILL AND THE FACT THAT PER STIRPITAL REPRESENTATION CAN HAVE NOT SIMPLY ONE MEANING, BUT FOUR DIFFERENT MEANINGS, THE PROBATE COURT COMMITTED REVERSIBLE ERROR IN CONCLUDING, THAT "THE WORDS 'PER STIRPES' AS USED WITH RESPECT TO THE DISTRIBUTION OF PRINCIPAL AND THE WORDS 'BY RIGHT OF REPRESENTATION' AS USED WITH RESPECT TO THE DISTRIBUTION OF THAT INCOME MEAN THE SAME THING." R. at P.V. 6 pp 6-7.

Mr. Damon used the words for the distribution of corpus, 'IN TRUST for all of my issue who shall then be living per stirpes and not per capita." Mr. Damon wished to avoid a complete per capita distribution under the then majority English Rule and, instead, intended a modified per stirpes distribution. Mr. Damon intended a modified per stirpes (per-capita-with-representation) as set forth, in RESTATEMENT (THIRD) OF PROPERTY §§ 2.3, Comment e (1998), below, and RESTATEMENT (FIRST) OF PROPERTY, § 301, cmt h., at 1648, *supra*.

In 1998, the American Law Institute issued a magisterial survey of historic American property law known as the RESTATEMENT (THIRD) OF PROPERTY (1998)

RESTATEMENT (THIRD) OF PROPERTY §§ 2.3 *et seq.* reported that stirpital representation has had not simply one meaning, but four different meanings:

1) Strict Per Stirpes (§ 2.3 Comment d),

2) Modified Per Stirpes (Per Capita With Per Stirpes Representation) (§ 2.3 Comment e), [the corpus distribution intended by Mr. Damon],

3) Original Uniform Probate Code (Per-Capita-With-Per-Capita Representation) (§ 2.3 Comment f), and

* * * *

APPENDIX E

SC. No. 25216

IN THE SUPREME COURT OF THE STATE OF HAWAII

PROBATE NO. 6664 IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON, Deceased.	P. NO. 6664; EQUITY NO. 2816-A APPEAL FROM THE JUDGMENT RE PETITION SEEKING AN INTERPRETATION OF THE WILL OF SAMUEL MILLS DAMON AS IT RELATES TO THE DISTRIBUTION OF THE CORPUS AT TERMINATION OF THE TRUST AND INSTRUCTING TRUSTEES AS TO DETERMINATION OF STIRPS, FILED JUNE 21, 2002
EQUITY NO. 2816-A TRUST CREATED UNDER THE WILL OF SAMUEL MILLS DAMON Deceased.	FIRST CIRCUIT COURT Honorable Virginia Lea Crandall and Honorable Colleen K. Hirai, Judges

APPELLANT-MOVANT, CHRISTOPHER JAMES DAMON HAIG'S MOTION FOR RECONSIDERATION OF AND FOR RELIEF FROM THE OPINION OF THE COURT filed On 16 February 2006;

* * * *

In 1993, the Probate Court used the RESTATEMENT (SECOND) OF PROPERTY, § 25.9 to interpret the Dwight Testamentary trust at the termination of said trust in 1993.

The *Trust Estate of Dwight*, 80 Haw. 233, 909 P.2d 561 (Haw. 1995), is not a controlling precedent for the Damon Testamentary Trust which must be interpreted in accordance with the law in 1924, the date of Mr. Damon's death,

II. Reconsideration is also requested of the proposition that the Damon Will when it stated:

> ". . . during the life of my said wife be given to her and after her death be given to such of my children as shall continue to live in equal shares. . ." established in the *income* provision, Paragraph 1, Page 2 of the Will, a testamentary system where after the measuring life [wife] the surviving first takers would receive in equal shares. This distribution system established in the income provisions was then carried over to the corpus provisions wherein after the death of the last measuring life, the first takers would receive in equal shares per stirpes. Precisely the Modified Per Stirpes system advocated herein in favor of the great-grandchildren.

III. Reconsideration is requested of the following point of fact and/or law:

> GIVEN THE WORDS OF THE DAMON WILL AND THE THEN CURRENT 1914 CONTROLLING LAW, THE PROBATE

COURT COMMITTED REVERSIBLE ERROR IN NULLIFYING SAMUEL M. DAMON'S TESTAMENTARY INTENT TO LEAVE THE TRUST CORPUS THROUGH A MODIFIED PER STIRPES METHOD, BY THE COURT'S APPLYING 86 YEARS RETROACTIVELY THE STRICT PER STIRPES INTERPRETATION, DIVESTING THE VESTED RIGHTS ESTABLISHED AT MR. DAMON'S DEATH IN 1924, THEREBY VIOLATING THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In 1914, the words, "All of my issue who shall then be living per stirpes and not per capita" had a very clear meaning, as set forth in the RESTATEMENT (FIRST) OF PROPERTY, below.

In 1936, only 12 years after Mr. Damon died in 1924, the American Law Institute initiated its survey of historic American property law (future interests) to report the status of law at the time Mr. Samuel M. Damon executed his Will. In 1940, the American Law Institute published its RESTATEMENT (FIRST) OF PROPERTY.

The RESTATEMENT (FIRST) OF PROPERTY, §301 Comment h provides:

> When a stirpital distribution is directed it is necessary to determine who are the heads of the respective stirpes. . . In cases where no . . . inference can be drawn from the terms of the limitation the *heads of the respective stirpes are the "possible takers" who are of the oldest generation in which there is at least one living member at the time when distribution is to be made.* RESTATEMENT

> (FIRST) OF PROPERTY, §301, cmt. h, at 1648. [Emphasis added].

At the time Mr. Damon wrote his Will, the majority view was that the phrase "to my descendants living at the time" is properly interpreted to mean that the residue *is divided equally among the members of the generation nearest to the testator in which at least one member is surviving at the time of distribution*, with the members of subsequent generations taking, if at all, by way of representation. *See*, Londo H. Brown, THE TESTATOR'S INTENT — VAGUE MEANINGS OF CLEAR SOUNDING PHRASES, 69 W. VA. L. Rev. 133, 148 (1967).

Law at Testator's Death. In Hawaii, a Will speaks from the time of the testator's death, and what is spoken is subject to the laws in force at that time. *In re Estate of Christian*, 65 Haw. 3944, 397, 652 P.2d 1137, 1140 (1982); *In re Estate of Searl*, 72 Haw. 222, 811 P.2d 828 (1991). The focus is not on today's law. The proper focus is the law at Mr. Damon's death in 1924.

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CONCLUSION

As counsel for Appellant-Movant, the undersigned requests that the Motion for Reconsideration be GRANTED.

* * * *

APPENDIX F

NO. 25216

IN THE SUPREME COURT OF
THE STATE OF HAWAI'I

Probate No. 6664
In the Matter of the Estate of
SAMUEL M. DAMON, Deceased.

Equity No. 2816-A
Trust Created Under the Will of
SAMUEL M. DAMON, Deceased.

APPEAL FROM THE FIRST CIRCUIT COURT
(P. NO. 6664 & EQUITY NO. 2816-A)

ORDER DENYING APPELLANT-MOVANT
CHRISTOPHER JAMES

DAMON HAIG'S MOTION FOR RECONSIDERATION
(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ.;
and Circuit Judge Wilson, in place of Duffy, J., recused)

Upon consideration of appellant-movant Christopher James Damon Haig's motion for reconsideration, filed February 27, 2006, the papers in support thereof, and the record herein,

IT IS HEREBY ORDERED that the motion is denied.

DATED: Honolulu, Hawai'i, March 9, 2006.

John L. McDermott,
for appellant-movant
Christopher James Damon
Haig, on the motion /s/

(5)

No. 06-39

Supreme Court, U.S.
FILED
AUG 9 - 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON,
TRUST CREATED UNDER THE WILL OF SAMUEL M. DAMON,
CHRISTOPHER JAMES DAMON HAIG,
Petitioner,

v.

SHARON DAMON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether petitioner properly presented his federal claim to the state courts of Hawaii;

2. Whether the judgment below rests on independent and adequate state law grounds.

3. Whether petitioner has a due process claim and, if so, whether it has any general importance;

PARTIES TO THE PROCEEDINGS

Respondents submitting this brief are Sharon Damon, Siddhartha Damon (by and through the Siddhartha Damon Trust), Sharmaya Sorenson, Ted (Frank Edward) Shaw, Heidi Ann Shaw, Talia Ann (Shaw) Hendricks, Samuel Kenny Damon, Julio Damon Spee, Miles Samuel Spee, Phillip Edward Spee, and Pia Spee, all of whom were appellees before the Supreme Court of Hawai'i. (See Pet. at iii.)

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IN THE

Supreme Court of the United States

No. 06-39

IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON,
TRUST CREATED UNDER THE WILL OF SAMUEL M. DAMON,
CHRISTOPHER JAMES DAMON HAIG,
Petitioner,

v.

SHARON DAMON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE[1]

The facts are as stated in the opinion of the Supreme Court of Hawaii. (App. at 2a-20a.) As that opinion makes clear,

[1] Pursuant to Rule 12.6 of this Court, respondents John Philip Damon and Brendan Damon Mesker (the "Mesker respondents") have filed a brief limited to advising the Court that they "support the position of Petitioner" (Brief of Respondents in Support of the Petition ("Mesker Resp'ts Br.") at 1), and respondents Michael E. Haig and Wendy A. Haig (the "Haig respondents") have filed a substantive brief (Brief of Respondents Michael E. Haig and Wendy A. Haig in Support of Petition for a Writ of Certiorari ("Haig Resp'ts Br.")), also in support of petitioner. The arguments advanced in the Haig respondents' brief track, and suffer from the same infirmities as, the contentions set forth in the petition itself. Accordingly, except where noted, we do not extend this brief by separately citing or addressing them.

this case involves only the interpretation under Hawaii law of the corpus distribution provision in a trust created under a last will and testament executed by Samuel Mills Damon, who died in 1924. A number of Mr. Damon's descendants, including petitioner, filed a petition with the First Circuit Court of Hawaii, sitting as the probate court. The circuit court petition sought an interpretation of a provision in the trust instrument that directed distribution of the trust corpus to "all of my issue who shall then be living per stirpes and not per capita." (*Id.* at 7a.)

The various groups of descendants advanced three different constructions: one that set the stirpital root at the level of Mr. Damon's children (respondents' position), another at the level of his grandchildren, and yet another at the level of his great-grandchildren (petitioner's and the Haig respondents' proposed interpretation). (*Id.* at 11a-12a.)[2] The circuit court concluded that the text of the will required setting the root at the children's level. (*Id.* at 17a.)

Petitioner and the Haig respondents appealed to the Supreme Court of Hawaii and filed briefs which (like their briefs in the circuit court) did not mention any federal issue. (App. at 62a-67a; *see infra* note 6.)[3] The supreme court affirmed the circuit court in all respects. (App. at 42a.)

The Supreme Court of Hawaii based its affirmance on an interpretation of the will's plain language, including that in provisions setting out detailed instructions regarding the distribution of trust income, which made it clear that Mr. Damon intended that the trust corpus be distributed in the

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[2] The Mesker respondents took no position on the per stirpes issue in the circuit court. (App. at 11a n.8.)

[3] On appeal, the Mesker respondents abandoned their circuit court neutrality stance and adopted petitioner's per stirpes position. (App. at 11a n.8.) The Mesker respondents' brief in this Court does not contend that any of their briefs below raised any federal issues.

same manner as income. (*Id.* at 33a-37a.) The court noted (*id.* at 27a) that eleven years earlier it had construed a will executed in 1926, and held that "[i]mplicit in the phrase ['per stirpes'] is the concept that the 'root' or 'stock' begins with the ancestors of those who are to take and *not* with the takers themselves." *Trust Estate of Dwight*, 909 P.2d 561, 563 (Haw. 1995) (citing Restatement (Second) of Property (Donative Transfers) §§ 25.9 and 28.2 (1988); *Weller v. Sokol*, 318 A.2d 193 (Md. 1974)). The court's opinion did not touch on any federal issue.

Petitioner (alone among the twelve appellants below) subsequently filed a motion for reconsideration. (App. at 68a-73a.) The motion repeated his prior arguments *verbatim*, except for a new phrase tacked on at the end of the motion stating (without citation or explanation) that the court's supposed error in interpreting the will "thereby violat[ed] unforeseeably and harshly the Due Process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution." (App. at 73a; *compare id.* at 62a-67a (petitioner's opening brief) *with id.* at 68a-73a (petitioner's motion for reconsideration).) The Supreme Court of Hawaii denied the motion without opinion. (*Id.* at 74a-75a.)

REASONS FOR DENYING THE PETITION

I. PETITIONER DID NOT PROPERLY PRESENT, AND THE SUPREME COURT OF HAWAII DID NOT DECIDE, ANY FEDERAL ISSUE

This Court has the power to review state court decisions only if they involve the denial of a federal right that was "specially set up or claimed" in the state court. 28 U.S.C. § 1257(a); *see Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam). Under § 1257 and its predecessors, this Court "almost unfailingly refuse[s] to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented

to the state court that rendered the decision [the Court] ha[s] been asked to review.'" *Howell*, 543 U.S. at 443 (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam)).

Petitioner's due process challenge does not meet either criterion.[4] The Supreme Court of Hawaii concededly did not decide petitioner's federal constitutional issue. (Pet. at 7.) Moreover, petitioner did not "properly present" it to that court. His briefs below were bereft of any mention of due process or the Federal (or State) Constitution, or citation to any case discussing any constitutional issue, much less any of this Court's cases. (*See* App. at 62a-73a.) Petitioner's briefs accordingly did not preserve the issue for the Court's review. *See, e.g.*, *Howell*, 543 U.S. at 443 ("Petitioner's brief in the State Supreme Court did not properly present his claim as one arising under federal law. In the relevant argument, he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases." (footnote omitted)); *cf. Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897) (A party's intent to invoke the Federal Constitution must be "unmistakably" declared, and a federal issue is not properly presented if "the purpose of the party to assert a Federal right is left to mere inference."); *Adams*, 520 U.S. at 89 n.3 ("[P]assing invocations of 'due process'" that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet [the Court's] minimal

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[4] This is so whether the presentation requirement is viewed as jurisdictional, *see, e.g.*, *Howell*, 543 U.S. at 445 (noting the "long line of cases" so holding), or prudential, because even if the rule is purely prudential, the circumstances in this case warrant no exception to it. *See id.* at 445-46; *Adams*, 520 U.S. at 90 (refusing to review due process issue that was neither presented to nor decided by state court; regardless of the source of the rule, comity and practical considerations counsel against permitting a party to seek to disturb the finality of state court judgments on federal grounds the state court did not have occasion to consider).

requirement that it must be clear that a *federal* claim was presented.").[5]

Nor did petitioner preserve the issue with his passing reference to "due process" in his motion for reconsideration. (*See* App. at 73a.) This Court does not review federal claims raised in the state court for the first time in a request for reconsideration, unless the state court in fact entertained the request and expressly decided the question. *See Adams*, 520 U.S. at 89 n.3 (the Court "generally refuse[s] to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987) (declining to review federal issue where "[a]ppellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal," and "court denied the petition without opinion").

Here, the Supreme Court of Hawaii did not address petitioner's due process argument. The court instead denied his motion for reconsideration without opinion (App. at 74a-75a), consistent with its procedural rule that legal arguments made for the first time on reconsideration come too late. *See State ex rel. Office of Consumer Prot. v. Honolulu Univ. of Arts, Scis. & Humanities*, 135 P.3d 113, 128 (Haw. 2006) ("'[R]econsideration is not a device . . . to raise arguments . . .

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[5] Petitioner did not present his due process issue to the circuit court either. His Statement of the Case (Pet. at 1-8) does not specify any stage of the proceedings in the state "court of first instance" when he raised his federal claim, as required by Rule 14.1(g)(i) and (i)(v) of this Court. Thus, even if petitioner had raised the issue in his briefs to the state supreme court, that court would have rejected the claim as untimely. *See Chung v. McCabe Hamilton & Renny Co.*, 128 P.3d 833, 850 (Haw. 2006) ("'[G]enerally, the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal.'" (quoting *State v. Hoglund*, 785 P.2d 1311, 1313 (Haw. 1990))).

that could and should have been brought during the earlier proceeding.'" (first ellipsis in original) (citation omitted)).[6]

II. THE JUDGMENT BELOW RESTS ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS

Had the Supreme Court of Hawaii reached and decided petitioner's federal law issue, his petition still would warrant denial. Except in extreme circumstances, this Court does not exercise its certiorari jurisdiction and review federal questions answered by a state court when the court's ruling rests on independent and adequate state law grounds. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (The Court will not review federal issues decided by a state court "if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.").

The decision of the Supreme Court of Hawaii rests on two such grounds. First, the court below did no more than complete the task before it—to construe the language of the will to determine Mr. Damon's testamentary intent. The court ruled that, when the will is read as a whole, Mr. Damon's intent was to distribute the trust corpus in the same manner as income. (*See, e.g.*, App. at 35a.) That ruling presents purely a matter of state law, akin to the interpretation of a private contract, "which this Court does not sit to review." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

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[6] The reasons why petitioner fails to meet the 28 U.S.C. § 1257 requirements apply *a fortiori* to the respondents who support his petition, as they do not (because they cannot) argue that they raised a due process issue in a motion for reconsideration, let alone in their briefs below. (*See* Haig Resp'ts Br. at 2 n.1 (expressly adopting petitioner's Statement of the Case); Mesker Resp'ts Br. at 1 (expressly adopting petitioner's position).)

Second, petitioner did not raise his claim "at the time and in the manner required" by the rules of the Supreme Court of Hawaii, *Webb v. Webb*, 451 U.S. 493, 501 (1981), i.e., either in the circuit court, *see Chung v. McCabe Hamilton & Renny Co.*, 128 P.3d 833, 850 (Haw. 2006), or in the Supreme Court of Hawaii prior to his motion for reconsideration, *see Honolulu Univ. of Arts, Scis. & Humanities*, 135 P.3d at 128. His failure to do so furnishes an additional independent and adequate state law ground for the state court's judgment. *See Adams*, 520 U.S. at 87-88 & n.1 (noting that the failure to comply with state procedural rules regarding proper presentation of issues provides an independent and adequate state law ground for the state court's judgment); *Webb*, 451 U.S. at 498 & n.4 (same).

III. PETITIONER'S DUE PROCESS CLAIM HAS NEITHER MERIT NOR GENERAL IMPORTANCE

Petitioner contends that the "Supreme Court of Hawaii retroactively applied new law (formulated no earlier than 1995) to reduce Petitioner's vested interest . . . [in violation of] his rights under the Due Process Clause of the Fourteenth Amendment." (Pet. at 8; *see also* Haig Resp'ts Br. at 8.) According to petitioner, the court retroactively applied the Second Restatement of Property (as cited in *Dwight*, 909 P.2d at 563) when it construed Mr. Damon's will, and instead should have applied Hawaii law as it allegedly existed in 1924—i.e., comment h to section 301 of the First Restatement of Property, published in 1940, sixteen years after Mr. Damon's death (Pet. at 4-5).[7] Petitioner asserts that the court's supposed failure to do so "conflicts with several of this Court's decisions concerning retroactive application of

[7] As noted in the Haig respondents' brief (at 5), section 301 of the First Restatement was published in 1940, not in 1936 as petitioner suggests (*see* Pet. at 4).

law." (*Id.* at 8.)[8] As shown below, his argument has at least three independent, but equally fatal flaws and, in any event, he presents a question of importance only to the litigants in this particular case.

A. Petitioner Had No Vested Property Right

Petitioner's due process argument fails on its own terms. He contends that he had a vested property right in Mr. Damon's estate in 1995. In his view, when the Supreme Court of Hawaii purportedly "changed" the law in *Dwight*, and then followed it eleven years later in this case, it reduced his supposedly vested right in violation of the Due Process Clause. (Pet. at 8; *see also* Haig Resp'ts Br. at i.)

Petitioner, however, had no vested right in 1995. The will provided for distribution of the trust corpus to Mr. Damon's issue "who shall then be living" at the death of his last surviving grandchild. (*See* App. at 7a.) Petitioner's rights therefore were contingent upon his surviving that grandchild, and those rights did not vest under Hawaii law until 2004, when the last grandchild died. (*See id.* at 9a & n.6); *see also Carter v. Davis*, 18 Haw. 439, *available at* 1907 WL 1386, at *4 (Haw. 1907) (Where testator makes gift to descendants "then living" at a future time, "the conclusion is almost irresistible that the devise of the future interest does not vest at the testator's death, but is contingent upon the devisees living to acquire the actual possession. The members of the class who are alive at the death of the testator take contingent remainders which vest in possession only in case they survive the life tenant."). Petitioner could not have been deprived of any part of a vested property right he did not have. *Cf. Bd. of*

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[8] Petitioner had a very different view of retroactivity below. There, he argued *in favor* of retroactive application of the law—specifically, the 1996 amendments to Hawaii's probate code. (*See* App. at 29a.) His theory thus appears to be that retroactivity comports with due process so long as the law to be retroactively applied supports him.

Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (due process principles protect only those property interests to which an individual has "a legitimate claim of entitlement").

B. The First Restatement Was Never The Law In Hawaii

Petitioner's "retroactivity" argument proceeds from the assumption that the First Restatement was once the law in Hawaii. It was not. Restatements are not law, and Hawaii courts often reject Restatement positions. *See, e.g.*, *Kohn v. W. Haw. Today, Inc.*, 656 P.2d 79, 82-83 (Haw. 1982) (declining to adopt § 580B of the Restatement (Second) of Torts); *Meridian Mortgage, Inc. v. First Hawaiian Bank*, 122 P.3d 1133, 1143 (Haw. Ct. App.) (same with respect to § 767 of the Restatement (Second) of Torts), *cert. denied*, 125 P.3d 1059 (Haw. 2005). Petitioner himself recognizes that the First Restatement's position was not "the law" in 1924, but at most was the "majority view" at the time. (App. at 71a; *see* Haig Resp'ts Br. at 5-6 & n.3 (conceding that courts prior to 1924 had rejected the First Restatement view)); *see also* William Draper Lewis, *"How We Did It," in Restatement in the Courts: History of the American Law Institute and the First Restatement of the Law* 12 (1945) (statement of Director of the American Law Institute that the First Restatement represents the "majority" view, and that "[t]here is always the possibility that a State has followed in the past and will continue to follow a different rule").

Petitioner cites no case in which the Hawaii courts adopted section 301 of the First Restatement, or the legal principles there discussed, before or after 1924, and the Haig respondents candidly admit that there are none. (*See* Haig Resp'ts Br. at 5.)[9] This is unsurprising, as the Supreme Court of

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[9] Although the Haig respondents claim that Hawaii's intestacy statute somehow reflected the "common understanding" of the term "per stirpes" used in a will (Haig Resp'ts Br. at 7), as the Supreme Court of Hawaii

First Restatement's position, holding with respect to a will executed in 1926 that a gift made "per stirpes" requires that the stirpital root "begins with the ancestors of those who are to take and *not* with the takers themselves." *Dwight*, 909 P.2d at 563. Thus, rather than "changing" the law, the state court merely announced Hawaii law as it always existed. *Cf. Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 365 (1932) (noting the "ancient dogma that the law declared by [the] courts ha[s] a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning").[10]

C. If The Decision In Fact Had Been "Retroactive," Petitioner Still Would Have No Due Process Claim

Even assuming that section 301 of the 1940 First Restatement somehow reflected Hawaii law in 1924 and that the Supreme Court of Hawaii retroactively changed it, such a ruling would have neither "conflict[ed]" with this Court's decisions (Pet. at 8), nor raised any due process issue. While it may be true, as petitioner contends, that the Court has

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held, the intestacy statute is irrelevant here because Mr. Damon did not die intestate. (*See* App. at 40a-41a.)

[10] In support of its holding that "per stirpes" means taking the share of one's ancestor, the court in *Dwight* relied in part on the Maryland Court of Appeals' 1974 decision in *Weller*, which predated the Second Restatement by fourteen years. *See Dwight*, 909 P.2d at 563. *Weller*, in turn, relied on a case from 1954 which held that, with respect to a trust instrument executed in 1912, the stocks must be set "among the testator's children, and not among the first takers." 318 A.2d at 197 (citing *Ballenger v. McMillan*, 106 A.2d 109 (Md. 1954)). Thus, contrary to petitioner's claim that section 301 of the First Restatement "fairly reflect[ed] the state of the law" in 1924 (Pet. at 4), it is clear that courts in the early part of the 20th Century rejected the First Restatement's approach.

this presumption applies only to retroactive *legislation*. The reverse presumption applies with respect to judicial decisions.

Indeed, "*[a]s a rule*, judicial decisions apply 'retroactively' . . . [and] a legal system based on precedent has a built-in presumption of retroactivity." *Solem v. Stumes*, 465 U.S. 638, 642 (1984) (emphasis added) (citation omitted). The very cases upon which petitioner relies draw this distinction between statutory and judicial retroactivity, and follow the "firm rule" in favor of judicial retroactivity. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 279 n.32 (1994) (noting that the Court has "established a firm rule of retroactivity" of federal judicial decisions); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.").[11] Thus, even were petitioner correct that the Supreme Court of Hawaii retroactively applied its case law (and he is not), doing so would have been fully consistent with this Court's jurisprudence.[12]

Nor would the state court's retroactive application of its precedent to petitioner's detriment have raised any due process concerns. This Court long ago held that "[s]tate courts . . . may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may

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[11] Indeed, in his brief to the Supreme Court of Hawaii, petitioner recognized this black-letter principle, and acknowledged that "*[l]egislative changes operate prospectively; judicial decisions are retrospective.*" (App. at 65a (emphasis in original) (citation omitted).) The Haig respondents likewise concede that as a rule, judicial decisions apply retroactively. (Haig Resp'ts Br. at 9.)

[12] The state court decisions petitioner cites (Pet. at 11 n.3) all involved retroactive application of legislation, not judicial decisions. Thus, even if the Supreme Court of Hawaii had retroactively applied its case law or the Restatement, there would be no "conflict" (*id.*) with these state court decisions.

decisions. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930); *see also, e.g., Great N. Ry.*, 287 U.S. at 364 ("We think the federal constitution has no voice upon the subject [of whether a state court gives its decisions a retroactive effect]."); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) ("[T]he mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law."); *cf. Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 177 (1990) ("When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.").[13]

Nothing in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), upon which petitioner principally relies (Pet. at 10-11), is to the contrary. *Bouie* held that a state court violates the Due Process Clause's requirement that a criminal defendant be afforded "fair warning" of a criminal statute's prohibitions, when the court "unforeseeably and retroactively" expands by judicial construction an otherwise "narrow and precise" criminal statute. 378 U.S. at 352. This Court recently clarified the scope of *Bouie*, holding that "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given

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[13] *Dunn v. Micco*, 106 F.2d 356 (10th Cir. 1939), cited by petitioner (Pet. at 9, 10), and *Thomas v. Washington Gas & Light Co.*, 448 U.S. 261, 272 (1980), cited by the Haig respondents (Haig Resp'ts Br. at 11), are fully consistent with these well-settled principles. Although the court in *Dunn* indicated its reluctance to depart from previous rulings in property cases, it did not base its reluctance on any due process concerns (nor could it have given this Court's decisions), but instead on the prudential doctrine of stare decisis. *See Dunn*, 106 F.2d at 358-59. This Court in *Thomas* likewise indicated its general reluctance to overrule its decisions under the doctrine of stare decisis. As discussed above, however, whether a state court adheres to the doctrine of stare decisis is a matter of no constitutional import. *See, e.g., Great N. Ry.*, 287 U.S. at 364.

retroactive effect, *only where* it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (quoting *Bouie*, 378 U.S. at 354) (emphasis added).

This case, of course, does not involve a criminal statute, and the "fair notice" principle does not apply. Moreover, there was no "unexpected and indefensible" change in the law, for, as discussed above, Restatements are not law, and petitioner cites no Hawaii case that ever adopted the principles he claims should have controlled in this case. Thus, the rule in *Bouie* is simply inapplicable. *See Rogers*, 532 U.S. at 464 (no due process violation where law that was retroactively changed by judicial decision "had only the most tenuous foothold as part of the criminal law" of the state); *cf. Bouie*, 378 U.S. at 356-57 (due process violated where state court's previous construction of criminal law "uniformly emphasized" a construction different from the one it applied to defendant); *Brinkerhoff-Faris*, 281 U.S. at 682 n.9 ("Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own.").

D. Petitioner's Issue Has No Importance Beyond This Case

Finally, petitioner offers no "compelling reason" why his dissatisfaction with a state court's interpretation of a corpus distribution provision in a will executed over ninety years ago (an interpretation he requested) presents a question worthy of this Court's time and attention. *See* Rule 10 of this Court. Petitioner finds the state court's interpretation objectionable because it results in his receiving a lower percentage of the trust corpus than he would receive under the interpretation he favors. Even if this complaint had merit (and, as we have

shown, it does not), it would have no significance beyond this case. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) ("[T]his Court does not sit . . . for the benefit of the particular litigants," but rather reviews only "special and important" cases that raise issues "beyond the academic or the episodic.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 06-39

IN THE

Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON,
TRUST CREATED UNDER THE WILL OF
SAMUEL M. DAMON,

CHRISTOPHER JAMES DAMON HAIG,

Petitioner,

v.

SHARON DAMON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Hawaii

BRIEF OF RESPONDENTS IN SUPPORT OF THE PETITION

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PARTIES TO THE PROCEEDING

Respondents are John Philip Damon and Brendan Damon Mesker. Respondents are identified as appellants before the Supreme Court of Hawaii along with Petitioner Christopher James Damon Haig, in the Petition at ii, Parties to the Proceedings.

Respondents support the position of Petitioner.

CONCLUSION

The Petition For a Writ Of Certiorari filed by Christopher James Damon Haig should be granted.

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IN THE

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CHRISTOPHER JAMES DAMON HAIG,

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v.

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Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Hawaii

BRIEF OF RESPONDENTS MICHAEL E. HAIG AND WENDY A. HAIG IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the state courts of Hawaii deprived Petitioner, Respondents Michael E. Haig and Wendy A. Haig, and other descendants of Samuel M. Damon, through his son, Henry F. Damon, of their property without due process of law by retroactively altering the meaning of per stirpes to reduce their fully-vested interests in the corpus of the trust created by the Damon will.

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BRIEF OF RESPONDENTS MICHAEL E. HAIG AND WENDY A. HAIG IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 12.6 of the Rules of this Court, Respondents Michael E. Haig and Wendy A. Haig (the "Haig Respondents") submit this brief in support of the petition for a writ of certiorari seeking review of the judgment of the Supreme Court of Hawaii in this case. That opinion is reported at 128 P.3d 815 (2006). Pet. App. 1a-42a.

Respondents Michael E. Haig and Wendy A. Haig are among the descendants of Samuel M. Damon through his son, Henry F. Damon, and thus, along with Petitioner in this case, stand to be wrongly deprived of a substantial portion of their inheritance as a result of the decision below of the Supreme Court of Hawaii. That decision denied them due process of law by declining to inquire into the meaning of the words "per stirpes" both when the will was signed and at his death, when it was admitted to probate, in 1914 and 1924, respectively. Instead of seeking out the contemporary meaning, the court below defined the rights of those taking under the will in accordance with modern decisions about the meaning of per stirpes, which are demonstrably inconsistent with the meaning at the time the will was written and submitted to probate.

In addition to joining Petitioner's reasons for granting certiorari, the Haig Respondents wish to highlight the following reasons why this Court should grant certiorari to correct the deprivation of property rights by the Supreme Court of Hawaii.

REASONS FOR GRANTING THE PETITION[1]

As the petition explains, under the corpus provision of Samuel M. Damon's will, which was drafted and signed in 1914, the Petitioner, the Haig Respondents, and others held vested rights from the time of their birth in the residuary estate of their great-grandfather, Damon, and their property interest was clearly established in 1924, the date of Damon's death, under the laws of Hawaii in force at the time. Pet. 8. The will afforded them, *inter alia*, rights to share in the distribution of the corpus of Damon's residuary estate at the time the Damon trust terminated, in accordance with the language of the will.

In ascertaining the meaning of the will's provision defining the distribution of corpus, the function of the state courts of Hawaii was to determine and to give effect to the donative intent of Damon as he expressed it in his will. *See Blair v. Ing*, 21 P.3d 452, 467 (Haw. 2001) (In interpreting testamentary documents, "the cardinal rule to which all other rules must bend is that the intention of the testator controls . . . ."); *see also Smith v. Bell*, 31 U.S. 68, 74 (1832) (Marshall, C.J.) ("The first and great rule in the exposition of wills, to which all rules must bend, is, that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. . . . It is emphatically *the will* of the person who makes it, and is defined to be 'the legal declaration of a man's intentions, which he wills to be performed after his death.' These intentions are to be collected from his words; and ought to be carried into effect if they be consistent with law. In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view.") (emphasis in original).

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[1] The Haig Respondents adopt and incorporate by reference the Parties to the Proceedings, Pet. ii, and Statement of the Case, Pet. 1-8, submitted by Petitioner in the petition for a writ of certiorari.

In that inquiry into Damon's intent, of course, it is the meaning and understanding of words used contemporaneously with Damon's usage that is relevant. *See Bishop Trust Co. v. Cooke Trust Co.*, 39 Haw. 641, 644 (1953) ("In trust deeds, as in wills, the intention of the donor must be ascertained from the documents as a whole and from the surrounding circumstances . . . ."); *In re Estate of Campbell*, 33 Haw. 799, 799 (1936) (court reviewed law in effect at time will was executed to determine testator's intent); *Mercer v. Kirkpatrick*, 22 Haw. 644, 647 (1915) (A court must "accept the aid of evidence of surrounding circumstances which will place the court as near as may be in the position of the testator as of the time he made the will.").

The present dispute regarding the proper allocation of the corpus turns on whether Damon intended a strict or modified per stirpes distribution of his residuary estate at the time the trust terminated, by use of the words "per stirpes and not per capita" in his will. Pet. App. 37a n.18; *see also* Pet. 6-8. If Damon intended a strict per stirpes distribution, then the stirpital root would be set at the level of his children, resulting in the corpus being divided into two shares, and thereafter subdivided by representation among the descendants of Samuel M. Damon's two children who had surviving issue, Samuel E. Damon and Henry F. Damon. Pet. App. 10a; Pet. 4. If Damon intended a modified per stirpes distribution, then the stirpital root would be set at the level of the first generation with living members at the time of the distribution—his great-grandchildren—resulting in equal shares for each of Damon's eighteen great-grandchildren, with the issue of any deceased great-grandchildren taking by representation. Pet. App. 10a; Pet. 4. Under the former approach, each taker in the line of Henry F. Damon (including Petitioner and the Haig Respondents) would receive either one-thirty-second (3.125 percent) or one-twenty-fourth (4.666 percent) of the residuary estate, depending on the number of children each

child of Henry F. Damon had (two had four children, two had three children), while each living great-grandchild in the line of his brother, Samuel E. Damon, would receive one-eighth (12.5 percent). Under the latter approach, Petitioner and the Haig Respondents, along with every other great-grandchild, would receive one-eighteenth (5.55 percent) of the residuary estate, Pet. 6, with the share of a deceased great-grandchild being taken by his or her issue per stirpes.

Rather than make any inquiry into the contemporaneous meaning of Damon's invocation of "per stirpes" at the time the will was written in 1914 and when it was submitted to probate upon his death in 1924, the Supreme Court of Hawaii instead relied on a 1995 decision of that court, *In re Trust of Estate of Dwight*, 909 P.2d 561 (Haw. 1995), and simply found that

> it is well established that "per stirpes" means "by or according to root," "according to or by stock," or "by right of representation," *i.e.*, that the descendants are to take through or as representatives of a parent. . . . Moreover, implicit in the phrase is the concept that the "root" or "stock" begins with the ancestors of those who are to take and not with the takers themselves.

Pet. App. 27a (quoting *In re Lock Revocable Living Trust*, 123 P.3d 1241, 1247 (Haw. 2005)) (emphasis omitted). Without examination of the 1914 or 1924 law, the Supreme Court of Hawaii concluded in *Damon* that "under Hawai'i law, per stirpes has [this] well-established and distinct meaning," and set the stirpital root at the level of Damon's children (strict per stirpes). Pet. App. 28a.

As set forth below, the failure of the Supreme Court of Hawaii even to inquire into the relevant common understanding of the language of the will—"per stirpes and not per capita"—at the time of drafting and death, has deprived Petitioner and the Haig Respondents of their rights to property under the will. Further, the court's reliance on its own conclusion in *Dwight* that "per stirpes has one distinct

meaning," Pet. App. 27a, effectuates a retroactive modification of longstanding rights under the will. By undertaking the retroactive application of new law to divest persons of their rights in property, the Supreme Court of Hawaii violated the due process rights of the Petitioner, the Haig Respondents, and others. This Court's review is thus warranted.

1. As the petition explains, the state of the law in Hawaii, as elsewhere, with regard to the effect of a per stirpes distribution of property in 1924, is set forth in the RESTATEMENT (FIRST) OF PROPERTY, which was published in 1940. Pet. 4-5. The RESTATEMENT, in a comment to Section 301 states unequivocally that, where a testator fails to expressly define the stirpital root that is to govern, "the heads of the respective stirpes are the 'possible takers' who are of the oldest generation in which there is at least one living member at the time when distribution is to be made." RESTATEMENT (FIRST) OF PROPERTY § 301, cmt. h. Thus, in this case, where the will provided for the distribution of corpus only upon the death of all children and grandchildren, and did not define a particular stirpital root, the first living generation—here, the great-grandchildren—are the "possible takers" where the stirpital root is set.

While there are no published decisions from Hawaii courts prior to 1924 announcing this (or any other) rule as the applicable rule in Hawaii, there are at least two reasons why this modified understanding of per stirpes is the only understanding that Damon could reasonably have had as to the effect of the language that he used in his will.

First, at the time of Damon's writing and death, the weight of case authority overwhelmingly favored modified per stirpes and rejected strict per stirpes, under which (absent contrary directive by the testator) the stirpital root is set invariably at the first generation below the testator. An American Law Reports annotation from 1922 discusses reported cases prior to 1924 which address the generational

level of the stirpital root, on facts, like those here, where the stirpital root is unidentified and the testator's children are no longer living at the time of the distribution. *See* 16 A.L.R. 15, at sub. IV (1922). All but one of the relevant cases are from English courts[2] and unequivocally adopt the rule of modified per stirpes set out in the RESTATEMENT (FIRST) and advocated by Petitioner.[3] Other cases our research has produced also adopt a modified per stirpes approach.[4] Thus in 1914 and in 1924, on the facts of this case, where a will called for per stirpes distribution at a time when the testator's children (and grandchildren) were all deceased, the stirpital root should be set at the level of the first living generation—

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[2] Hawaii law provides, as it has at all relevant times: "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage . . . ." Haw. Rev. Stat. § 1-1 (1993).

[3] The first case noted by the American Law Reports that explores the issue, *Robinson v. Shepard*, (1863) 46 Eng. Rep. 865 (H.L.), adopted the modified per stirpes rule. In 1867, a lower English court of equity applied a strict per stirpes rule in *Gibson v. Fisher*, (1867-1868) 5 L.R. Eq. 51 (Eng.). Thereafter, three English courts explicitly rejected *Gibson* and found the modified per stirpes rule of *Robinson* to be authoritative precedent. *In re Alexander*, (1919) 1 Ch. 371; *In re Dering*, [1911] 105 L.T.N.S. 404 (Eng.); *In re Wilson*, (1883) 24 Ch.D. 664. *See generally* Frederick J. Singley, Jr., Patchell v. Groom *Revisited: Distributions Among Descendants Per Stirpes*, 15 MD. L. REV. 1, 7 (1955). In 1914, the New York courts adopted the modified per stirpes rule, relying on the English authority. *In re Title Guar. & Trust Co.*, 106 N.E. 1043 (N.Y. 1914) (affirming 144 N.Y.S. 889 (N.Y. App. Div. 1913)). At best, the *Gibson* adoption of strict per stirpes was a common law aberration.

[4] *See Giles v. Von Cain*, 117 S.E. 488, 489 (W. Va. 1923) (holding that a bequest to the heirs of three deceased children would be divided among the grandchildren per capita, without regard to their parentage); *Taylor v. Cribbs*, 56 So. 952, 952 (Ala. 1911) (holding that when a bequest is to children or heirs of a named deceased individual, the children will take equally regardless of parentage).

here, the testator's great-grandchildren—and not, as the court below did, at the level of the first generation, that is the testator's own children.

Second, while not defined in any extant Hawaii court decision, the common understanding of a per stirpes distribution in Hawaii, when no child of an intestate is living, is set out in the language of the Hawaii intestacy statute that governed during this 1914 to 1924 timeframe.[5] That statute invokes the concept of a per stirpes distribution and expressly defines it in a manner that sets the stirpital root *not* at the level of the intestate's deceased children, but at the level of the *first living generation at the time of distribution*—that is, a modified per stirpes distribution. The statute makes clear, in the instance where there is "no child of the intestate living at his death, . . . [the intestate's] estate shall descend to all his other lineal descendants" under the following rules:

> If all the said descendants are in the same degree of kindred to the intestate, they shall share the estate per capita, that is, equally; otherwise they shall inherit per stirpes, that is, by each of the children taking a share, and the grandchildren, [that is] the children of a deceased child taking a share, to be afterwards divided among themselves.

Rev. L. Haw. § 3246 (1915); *see also* Rev. L. Haw. § 3305 (1925); 32 Haw. Civ. Code § 1448 (1898). According to this statute, then, a per stirpes distribution was understood to require *equal division among the first generation with any living members*, with the issue of each deceased member of that living generation dividing the share of the deceased member by right of representation.

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[5] That statute defines the rights of inheritance which shall govern when a person dies without a will and thus is not directly applicable to Damon's will. It does, however, reflect the contemporaneous understanding of the meaning of a per stirpes distribution.

For these reasons, it is clear that Damon could only have intended a modified per stirpes distribution of the residual corpus of his estate at the time the trust terminated. Any other understanding would be contrary to the common usage of per stirpes made plain in this time period by both contemporaneous judicial and legislative pronouncements.[6]

Ignoring the question of what Damon's words meant at the time they were used, the Supreme Court of Hawaii simply interposed its own modern understanding of per stirpes, expressed in its 1995 decision in *Dwight*, which held that any reference to per stirpes meant that a strict per stirpes distribution of the corpus was required. By thus ignoring the common understanding of per stirpes at the time of Damon's will and death, the court diminished the Petitioner and Haig Respondents' vested interest in the residuary estate by nearly 44 percent per person. The Supreme Court of Hawaii's retroactive application of a new judicial rule created in 1995 thus violated the due process rights of the Petitioner and the Haig Respondents, as well as the laws of Hawaii.[7] *See* Pet. 8-11.

2. As the petition shows, newly enacted legislation will not be applied retroactively, absent a clear statement of legislative intent to do so, Pet. 8-9, because the retroactive application of new legislation to conduct occurring previously generally raises serious questions of fairness and due process. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997). This rule exists to protect property rights and other "interests in fair notice and

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[6] As the petition states, "[b]y the time the Damon trust was nearing termination, the law in Hawaii concerning per stirpes distributions had changed dramatically." Pet. 5. This change in the common approach to stirpital distributions was also noted in the RESTATEMENT (SECOND) OF PROPERTY § 28.1, cmt. 3(b) (1980), which only cites cases after 1945 as conflicting "with the old common-law rule [of modified per stirpes]."

[7] *See* Haw. Rev. Stat. § 1-3 (1993) ("No law has any retrospective operation, unless otherwise expressed or obviously intended.").

repose" that are essential to our constitutional order under the Due Process clause. *See Lynce v. Mathis*, 519 U.S. 433, 440 n.12 (1997) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)); *see also* Pet. 9.

In light of this understanding, there is a strong presumption against any such intent on the part of the legislature. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 284-85 (1994). Where that presumption is overcome by clear evidence of a contrary legislative purpose, the statute's retroactive application is subject to close constitutional scrutiny. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) (invalidating retroactive liabilities under the Coal Health Benefits Act of 1992); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 637 (1993) (rejecting Due Process and Takings clause challenge to Multiemployer Pension Plan Amendments Act); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731-33 (1984) (rejecting due process challenge to Multiemployer Pension Plan Amendments Act of 1980); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19-20 (1976) (rejecting due process challenge to retroactive application of Black Lung Statute).

Of course, it is generally true that court decisions interpreting an existing law apply to any future application of that statute. This is so because they do not "pronounce a new law, but [ ] maintain and expound the old one." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (15th ed. 1809). They are generally applicable in pending cases in which that interpreted law governs, regardless of whether the decision pre-dates the conduct at issue. *Schriro v. Summerlin*, 542 U.S. 348, 350 (2004) ("New substantive rules generally apply retroactively" including decisions narrowing the scope of a criminal statute and placing the particular conduct or persons covered by a statute beyond the State's power to punish.) (emphasis omitted); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 89-90 (1993) (holding that Supreme Court's application of a

rule of federal law to the parties before the Court requires all courts to give retroactive effect to the decision thus applied).

But critical exceptions to this rule exist where the character of a decision is such as to make retroactive application unfair, because it would be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie v. City of Columbia*, 378 U.S. 347, 358 (1964) (internal quotation marks omitted); *e.g.*, *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001) ("limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process").

A clear example of a situation where recent decisions are not properly applied wholesale to past conduct is that presented here—where the matter in issue is the proper understanding of a will drafted decades ago. The language of a will is to "be construed as of the date of its execution and in light of the then surrounding circumstances," or as of the time of the testator's death. 80 AM. JUR. 2d *Wills* § 1015 (2006) (citing *Adams v. Cowen*, 177 U.S. 471 (1900)); *see also In re Estate of Searl*, 811 P.2d 828, 830 (Haw. 1991) ("[I]t has been well settled that a will speaks from the time of the testator's death, and that what is spoken is subject to the laws in force at that time.") (internal quotation marks omitted). "The language employed in a conveyance, read as an entirety and in the light of the circumstances of its formulation, constitutes the objectively observable manifestation of the conveyor's intent and hence is necessarily assumed to evidence his subjective intent." RESTATEMENT (FIRST) OF PROPERTY § 242, cmt. a (1940). And that language is to be read in light of the law as it existed at the time the instrument was drafted and allowed by the testator to take effect. For a testator is presumed to know the law, both statutes and precedent, which are relevant to the disposition of his estate. *See N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 348-49 (1921); 80 AM. JUR. 2d *Wills* § 1039 (2006). By preparing a will, a testator creates certain rights, relying on the contemporaneous understanding of the

language used. In that context, arguments against courts ignoring that meaning, and simply applying new meanings of legal terms that evolved years later, "have special force." *See Thomas v. Wash. Gas & Light Co.*, 448 U.S. 261, 272 (1980).

Here the testator, Samuel M. Damon, executed his will in 1914 and left it unaltered so that it went into effect in 1924, using words whose meaning was unmistakable based on the common legal understandings of that time. "There is no question . . . that the right to pass on valuable property to one's heirs is itself a valuable right." *Hodel v. Irving*, 481 U.S. 704, 715 (1987). The rights to define the manner and recipients of that property, and to receive the property bequeathed, are no less valuable. Yet the Supreme Court of Hawaii ordered a distribution contrary to the then-common understanding, without making any inquiry at all into the meaning of the words at the time they were written. Further, it ignored the vested rights of Petitioner and the Haig Respondents and applied 1995 law to a 1914 will probated at the testator's death in 1924. By doing so, the Supreme Court of Hawaii acted contrary to the decisions of this Court and deprived Petitioner, the Haig Respondents, and the remaining descendants of Samuel M. Damon through his son, Henry F. Damon, of property without due process of law.

CONCLUSION

For these reasons and those explained in Christopher Damon Haig's petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON,
TRUST CREATED UNDER THE WILL OF SAMUEL M. DAMON,

CHRISTOPHER JAMES DAMON HAIG,
Petitioner,

v.

SHARON DAMON, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Hawaii

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief in opposition implicitly concedes that, if the modified per stirpes rule set out in a comment to Section 301 of the Restatement (First) of Property was in force in Hawaii when Samuel Mills Damon died in 1924, the Hawaii state courts, in construing the corpus distribution of the Damon will, should have set the stirpital root at the level of Mr. Damon's great-grandchildren as the first living generation of takers. Rather than grapple seriously with the due process implications of the Hawaii courts' retroactive application of a rule first adopted in 1995, the respondents in opposition spend most of their brief raising supposedly insurmountable procedural obstacles to this Court's consideration of the question presented in the Petition and attacking the property law predicates to Petitioner's due process claim. As demonstrated below, the procedural arguments raised by the respondents in opposition are based on an unduly restrictive view of this Court's jurisdiction, and their state law attacks on Petitioner's due process claim are unsupported by the law of Hawaii.

To the extent that the respondents in opposition address Petitioner's due process claim at all, they argue that, in civil cases, state courts are completely unconstrained in their ability to create new rules of law and apply them retroactively to diminish the rights of the parties before them. That contention, however, runs headlong into this Court's decision in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). *Bouie* did not, as the opposing respondents assert, merely give constitutional character to the fundamental rule of lenity that applies in all criminal proceedings. Rather *Bouie* established clear limits on the power of state courts to apply retroactively new and unforeseeable rules to the parties before them. And as the late Chief Justice Rehnquist's concurring opinion in *Bush v. Gore* makes clear, those limits apply whether the proceedings are criminal or civil. The petition for a writ of certiorari should be granted.

I. PETITIONER PROPERLY PRESENTED HIS DUE PROCESS CLAIM TO THE COURTS OF HAWAII

The respondents in opposition first contend (at 3-6) that this Court lacks jurisdiction to entertain the Petition because Petitioner did not "specially set up or claim[]" the denial of a federal right before the state court. 28 U.S.C. § 1257(a). Relying principally on this Court's per curiam decision in *Adams v. Robertson*, 520 U.S. 83 (1997), they argue that this Court lacks jurisdiction under Section 1257 unless the litigant before the state court explicitly incants the particular provision of federal law on which he or she relies. *See* Opp. Br. 4 (citing *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897)). But *Adams* does not remotely establish so exacting a standard. As *Adams* itself recognizes, where, as here, the state court has refused to address a petitioner's federal law claim, a petitioner must establish only that "the state court had 'a fair opportunity to address the federal question that is sought to be presented.'" 520 U.S. at 87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)). While a "mere inference" will not suffice to raise a claim of federal right, "no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted." *Green Bay & Miss. Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 67 (1898). Rather, this Court's jurisdiction may be called upon whenever "the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). This may be accomplished in "various ways." *Id.* Where the record as a whole shows – "by clear and necessary intendment" – that the federal question must have been directly involved, "the claim is to be regarded as having been adequately presented." *Id.*; *see also Green Bay & Miss. Canal*, 172 U.S. at 67-68; *Bridge Proprietors v. Hoboken Co.*, 68 U.S. 116, 143 (1864).

Petitioner's presentation of his due process claim to the Hawaii Supreme Court far exceeded this "minimal requirement." *Adams*, 520 U.S. at 89 n.3. Petitioner first raised his due process claim in his opening brief to the Hawaii Supreme Court, where he argued that the probate court's identification of *Trust Estate of Dwight*, 909 P.2d 561 (Haw. 1995), as controlling precedent to determine the distribution of the corpus upon the termination of the trust had nullified the intent of the testator at the time of his death in 1924, and retroactively employed a new rule to divest Petitioner of rights in property he had held since birth. Pet. App. 63a. And he explicitly invoked the Constitution on page five of his reply brief: "A retroactive or retrospective law, *in a constitutional sense*, is one that takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transaction or considerations already passed. *Employees' Ret. Sys. v. Wah Chew Chang*, 42 Haw. 532 (1958)." *Damon II*, Reply Brief of Christopher J.D. Haig at 5 (emphasis added).[1] The Reply Brief goes on to cite a number of state cases that discuss at length the constitutional issues raised by a law's retroactive

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[1] That Petitioner's reply brief in the Supreme Court of Hawaii did not specifically identify the United States Constitution is inconsequential. Where a right under state law is coextensive with the corresponding right under federal law, the identification of the state law claim will suffice to present to the state court both the state and the federal issue. *Jackson v. Edwards*, 404 F.3d 612, 621 (2d Cir. 2005); *see also Howell v. Mississippi*, 543 U.S. 440, 445 (2005) (per curiam) (reserving the question whether presentation of state law claim fairly presents identical claim under federal law). There is no significant difference between the rights accorded by the Due Process Clause of the Constitution of the State of Hawaii, and that of the 14th Amendment to the U.S. Constitution. *See Hawaii v. Silva*, 890 P.2d 702, 704-05 (Haw. Ct. App. 1995); *see also Hawaii v. Culkin*, 35 P.3d 233, 253 (Haw. 2001) ("[W]e are 'under the obligation to construe the state constitution, not in total disregard of federal interpretations of identical language, but with reference to the wisdom of adopting those interpretations for our state.'"(citation omitted)).

application. Reply Br. at 5. Importantly, a number of those state cases look to Justice Story for his definition of "retrospective law." *See Wah Chew Chang*, 42 Haw. at 535-36; *Graham Constr. Supply, Inc. v. Schrader Constr., Inc.*, 632 P.2d 649, 652 (Haw. 1981). And one case cited, *Roe v. Doe*, 581 P.2d 310 (Haw. 1978), considered whether the retrospective application of a longer limitations period for paternity actions would violate the right to due process under the federal *and* state Constitutions.

The Supreme Court of Hawaii had more than a "fair opportunity" to address Petitioner's due process claim. It simply and steadfastly refused to do so. Such intransigence cannot deprive this Court of jurisdiction under Section 1257. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973) (holding that state court's refusal or failure to articulate its denial of the federal claim is just as reviewable as an express decision on the point).

II. THERE IS NO INDEPENDENT STATE GROUND CAPABLE OF JUSTIFYING THE REJECTION OF PETITIONER'S DUE PROCESS CLAIM

The respondents in opposition suggest that there were adequate and independent state law grounds for the rejection of Petitioner's federal due process claim. Specifically, the respondents in opposition argue that the Hawaii courts' construction of the Damon will pursuant to state law and Petitioner's failure to comply with state procedural rules each constitute independent justification for the state court's retroactive application of a new rule to diminish Petitioner's rights in property. *See* Opp. Br. 6. These arguments are just makeweight.

As to the first, Petitioner asserts that the Hawaii courts' construction of the Damon will – specifically, its corpus distribution provision – itself violated Petitioner's due process rights under the 14th Amendment to the United States Consti-

tution. A state law ground cannot be viewed as independent where it is so tightly "interwoven" with the federal claim. *See also Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983); *Coleman v. Thompson*, 501 U.S. 722, 735 (1991); *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931) (citing *Creswill v. Grand Lodge Knights of Pythias*, 225 U.S. 246, 261 (1912)).

As to the second, respondents in opposition argue that Petitioner failed to timely raise his federal claim before the probate court and the Supreme Court of Hawaii. But Petitioner's due process claim – which is based on the retroactive *application* of new law – could not have become ripe before the probate court actually *applied* the new rule to diminish Petitioner's rights in property. And as discussed above, Petitioner raised his newly ripe federal law claim at the first available opportunity – in his opening brief to the Supreme Court of Hawaii. Moreover, this Court presumes that no procedural bar exists unless the last state court rendering a judgment in the case states clearly and expressly that its judgment rests on such. *Harris v. Reed*, 489 U.S. 255, 263 (1989); *Jones v. Stinson*, 229 F.3d 112, 118 (2d Cir. 2000) (noting that "[a]bsent a plain statement" in the decision of the state court that its rejection of a claim rests on a state procedural ground, federal courts "conclusively presume" otherwise).

III. THE DECISION BELOW REDUCED PETITIONER'S VESTED PROPERTY RIGHTS IN VIOLATION OF THE DUE PROCESS CLAUSE

The respondents in opposition level three attacks at Petitioner's due process claim. They first claim that at the time of the decision of the Supreme Court of Hawaii, Petitioner had no vested rights in the trust corpus. Second, they argue that, at the time of Mr. Damon's death, Hawaii applied not the majority view "modified per stirpes" rule described in the First Restatement, but rather the "strict per stirpes" rule described in the Restatement (Second) of Property, published in 1988.

Finally, they argue that retroactive application of new law by the judiciary (as opposed to a legislature) raises no constitutional concerns. None of these arguments affords a basis for denial of certiorari.

A. Petitioner's Interest In The Corpus Of The Trust Vested Before The Decision Below

The respondents in opposition argue that because the Damon will imposes a survivorship condition on taking from the corpus ("to all my issue who shall then be living," Pet. App. 7a), no rights in the corpus vested until the death of Petitioner's mother (Samuel Mills Damon's last surviving grandchild), on November 9, 2004.[2] *See* Opp. Br. 8. Therefore, they contend, Petitioner "had no vested right in 1995," when the Supreme Court of Hawaii changed the meaning of "per stirpes." Opp. Br. 8. Even assuming that is true, it is insufficient to defeat Petitioner's due process argument. Petitioner's and all the beneficiaries' rights in the corpus indisputably had vested by the time the Supreme Court of Hawaii issued its decision on February 16, 2006. That decision retroactively applied new law to diminish those rights in property, and it is that destruction of vested property rights from which Petitioner here seeks redress.

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[2] Joan Haig, the last surviving grandchild, died during the pendency of the appeal, thus triggering the termination of the Damon trust. The Hawaii Supreme Court was aware of her death, having consequently approved the motion for substitution of Michael Haig as the executor of the estate of his mother, Joan Haig. *In re Estate of Damon*, 128 P.3d 815, 826 (Haw. 2006) (*Damon II*). Despite having received notice that all surviving beneficiaries had survived until possession and were vested absolutely, the state court issued its Opinion destroying vested property rights fourteen months later. One month later, the state court denied Petitioner's Motion for Reconsideration without Opinion.

B. In 1924, Hawaii Indisputably Applied A Modified Per Stirpes Rule

The respondents in opposition half-heartedly argue that in 1924, Hawaii applied not the modified per stirpes distribution rule found in the Restatement (First) of Property, but rather the strict per stirpes rule described in the Restatement (Second) of Property, published in 1988. The Supreme Court of Hawaii made no effort whatsoever to ascertain the law controlling per stirpes distributions as it stood in 1924. And indeed, no published decision of the Hawaii courts is dispositive of this question. For at least two reasons, however, this Court can be sure that, when Mr. Damon instructed that the corpus be distributed "per stirpes," he intended a modified per stirpes distribution.

First, as the respondents in opposition acknowledge (at 9), the modified per stirpes rule described in the First Restatement was the majority view at the time of Mr. Damon's death.

Second, as respondents in opposition implicitly concede (at 9 n.9), the intestacy statute then in force required the stirpital root to be set at the level of oldest descendant alive at the time of distribution. *See* Br. of Resp't Michael E. Haig, *et al.* in Supp. of Pet. at 7. And Hawaii law is clear that, in a case of testamentary ambiguity, the intestacy statute controls. *Peters v. Vannatta*, 41 Haw. 249, 265 (1955) ("When the real intent of the testator is in doubt and the language of the will is consistent with such a distribution, there is a presumption in favor of the natural heirs of a distribution according to the statutes of descent and distribution.").

Against this background, this Court cannot accept the opposing respondents' contention that, in *Trust Estate of Dwight*, 909 P.2d 561 (Haw. 1995), the "state court merely announced Hawaii law as it always existed." Opp. Br. 10.

C. Retroactive Application Of New Law By A State Court Implicates Rights Secured By The Due Process Clause

Finally, addressing the substance of Petitioner's due process claim, the respondents in opposition claim that retroactive application of law by a state court raises no due process concerns and that Petitioner's constitutional claim accordingly lacks merit. Opp. Br. 10-12. The merits of a claim, of course, are not a relevant consideration at the petition stage. *See* Sup. Ct. R. 10. Even so, the respondents in opposition are clearly wrong. The decision below stands in stark conflict at least with this Court's decision in *Bouie*, and this case therefore warrants this Court's review. *See* Sup. Ct. R. 10(c).

It is beyond dispute that this Court held in *Bouie* that the Due Process Clause barred a state court from retroactively applying a new rule of law to the parties before it. *See* 378 U.S. at 362. The notion – greatly relied upon by opposing respondents – that "the Federal Constitution has no voice upon the subject" of whether a state court may apply a new rule of law retroactively to the parties before it, *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932), has thus been upended and discredited.

Respondents in opposition seek to confine *Bouie* and its due process "voice" upon retroactive application of judicially-created rules of law to criminal cases. *See* Opp. Br. 12-13. In opposing respondents' view, inasmuch as *Bouie* holds that the retroactive application of a new rule of law violates due process, it represents nothing more than a rote application of the rule of lenity. Although *Bouie* is unquestionably a criminal case, nothing in that decision limited the due process principle there announced to the criminal context. Nor did this Court's decision in *Rogers v. Tennessee*, 532 U.S. 451 (2001), establish, as opposing respondents suggest (at 12-13), that *Bouie* has no application in civil cases. To the contrary, the Court in *Rogers* rejected the notion that *Bouie* merely applied the strictures of the Ex Post Facto Clause to judicial decision-making,

stating, "[o]ur decision in *Bouie* was rooted firmly in well established notions of *due process*," including "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning." *Rogers*, 532 U.S. at 459. Indeed, that *Bouie* has application in civil cases was confirmed by the late Chief Justice just months before the decision in *Rogers*. In *Bush v. Gore*, Chief Justice Rehnquist argued, in reliance on *Bouie*, that the Florida Supreme Court's retroactive application of its new interpretation of state electoral law was invalid. 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring). The decision below thus stands in conflict with the "core due process concepts" announced in *Bouie* (*Rogers*, 532 U.S. at 459), and accordingly warrants this Court's review.

IV. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS THIS COURT'S REVIEW

Respondents in opposition finally contend that this case does not "present[] a question worthy of this Court's time and attention." Opp. Br. 13. To be sure, this case involves a dispute among family members over the correct construction of a will. But the *question* presented by the petition – fundamentally, whether and to what extent the Due Process Clause limits the authority of state courts to apply retroactively new rules of state law – has implications that far transcend the particulars of this dispute. As amply demonstrated by the brief of *amicus curiae* Judicial Watch Inc., the decision below raises serious questions concerning "predictability in the application of the law and the protection of settled expectations and vested rights," which form the basis not only for our system of private property, but also for the rule of law in general. Br. of Judicial Watch, Inc. at 2. If the judgment of the Supreme Court of Hawaii is left undisturbed – if state courts are at liberty to re-write the law of property and retroactively apply the revision to the parties before it – it must follow that no testator's estate plan can be completely secure from judicial

reformulation. Indeed, if state courts have no constraint on their power to apply new rules retroactively other than their fidelity to the tradition of *stare decisis*, no interest in property based on a settled view of state law is secure. This Court's review is warranted – both to clarify the due process limits on state judicial power and to provide safety to property rights that are currently endangered by the erroneous view of the Supreme Court of Hawaii that there are no such limits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 06-39

IN THE

Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON,
TRUST CREATED UNDER THE WILL OF SAMUEL DAMON,

CHRISTOPHER JAMES DAMON HAIG,
Petitioner,

v.

SHARON DAMON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Hawaii

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Judicial Watch, Inc. ("Judicial Watch") respectfully submits this *amicus curiae* brief in support of Petitioner Christopher James Damon Haig. Pursuant to Supreme Court Rule 37.2(a), counsel for all parties have consented to the filing of this *amicus curiae* brief. Written consent to the filing of this brief is being filed with the Clerk of the Court.[1]

INTEREST OF THE *AMICUS CURIAE*

Judicial Watch is a not-for-profit organization that seeks to promote integrity, transparency, and accountability in government, politics, and public life. In furtherance of these goals, Judicial Watch regularly monitors significant developments in the court system and the law, pursues public interest litigation, and files *amicus curiae* briefs on issues of public concern, among other activities. Judicial Watch is participating as *amicus curiae* in this matter because it is particularly concerned about the legal protections afforded to property rights, the fair and consistent application of precedent, and the regularity of court process. Judicial Watch believes this matter implicates all three of these important concerns.

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[1] Pursuant to Supreme Court Rule 37.6, Judicial Watch states that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari should be granted to address an important federal question raised by the Supreme Court of Hawaii's ruling in this matter, namely, whether a state can violate the Due Process Clause of the Fourteenth Amendment by giving retroactive application to the rulings of its courts. The Supreme Court of Hawaii appears to have disregarded this Court's decisions and violated Petitioner's Fourteenth Amendment rights by applying a 1995 decision to the estate of a testator who passed away in 1924. In so ruling, the Supreme Court of Hawaii failed to even consider whether the 1995 ruling should be given retroactive effect, thereby substantially diminishing the portion of the estate to which Petitioner otherwise would have been entitled.

ARGUMENT

A. THE FEDERAL APPROACH TO RETROACTIVITY

Of primary importance in any fair and just and legal system is predictability in the application of the law and the protection of settled expectations and vested rights. These concerns provide the basis, at least in part, for several provisions of the U.S. Constitution, including the *Ex Post Facto* Clauses, the prohibition on impairment of contractual obligations, the prohibition on bills of attainder, the Takings Clause, and the Due Process Clause. *Landgraf v. USI Film Products*, 511 U.S. 244, 266-68 (1994). These same concerns also provide the basis for the principle of *stare decisis*. *Intel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 79 (1993) (Scalia, J., concurring) (noting that the principal purposes of

stare decisis are "to protect reliance interests and to foster stability in the law."). As this Court has declared:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."

Landgraf, 511 U.S. at 265 (citation omitted).

Perhaps nowhere do these concerns have greater significance than in the context of retroactivity. This Court's "retroactivity" jurisprudence is substantial.

The Court has declared repeatedly that there is a presumption against the retroactivity of federal statutes. *Landgraf*, 511 U.S. at 265-66. "The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 271. The Court has described this presumption as being "deeply rooted in our jurisprudence" and "embod[ying] a legal doctrine centuries older than our Republic." *Id.* at 265. The possibility that the "Legislature's unmatched powers [could] allow it to sweep away settled expectations suddenly and without individualized consideration" prompted the Court to require a clear expression of congressional intent to defeat this clear

presumption against retroactivity. *Id.* at 266; *see also United States v. Security Indus. Bank*, 459 U.S. 70, 82 (1982).

The Court has adopted a separate set of rules to govern the retroactivity of federal judicial decisionmaking. Rather than applying a presumption for or against retroactivity, the Court has held that the following three factors should be analyzed: (1) whether the decision establishes a new principle of law by either overruling a relied-upon precedent or deciding an issue of first impression not clearly foreshadowed; (2) whether the purpose and effect of the decision would be furthered or restricted by retroactive application; and (3) whether the inequity imposed in the retroactive application is substantial or works an injustice or hardship. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971).

"When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *American Trucking Ass'n v. Smith*, 496 U.S. 167, 177 (1990); *see also Great Northern Railway v. Sunburst Oil*, 287 U.S. 358, 364-65 (1932).

This authority is not without limitations, however. In *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 99 (1993), the Court held that "[t]he Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." "Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law cannot extend to their interpretations of federal law." *Id.* (internal citation omitted). Similarly, in *American Trucking Ass'n*, the Court declared that it has consistently required state courts to "adhere to our retroactivity decisions" in order

to "ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights." 496 U.S. at 178.

The Court addressed this issue more directly in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991):

> It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct. . . . Once a rule is found to apply "backward," there may then be a further issue of remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one.

Id. at 534-35. While the Court noted that this inquiry is governed by state law, at least where the case originates in state court, it nonetheless is "[s]ubject to possible constitution thresholds." *Id.* at 535.

The Court expressly applied this constitutional limitation on the retroactivity of state judicial decisions in both *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930) and again in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In *Brinkerhoff-Faris Trust & Sav. Co.*, the Supreme Court of Missouri overruled a prior decision finding that a state statute did not create an administrative remedy, then found against the plaintiff for failing to pursue the previously

unavailable remedy. This Court found that the Supreme Court of Missouri's ruling violated the plaintiff's Fourteenth Amendment rights:

> It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.
>
> But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits . . . Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, -- whether it has had an opportunity to present its case and be heard in its support.

281 U.S. at 680-81.

In *Bouie*, this Court found that the Fourteenth Amendment's Due Process Clause prohibited the State of South Carolina from convicting the defendants of violating its criminal trespass statute based upon an interpretation of the statute by the South Carolina Supreme Court that was "clearly

at variance with the statutory language" and did not have "the slightest support in prior South Carolina decisions." 378 U.S. at 356.

B. HAWAII'S APPROACH TO RETROACTIVITY

Importantly, Hawaii has its own precedent governing the retroactivity of its state law decisions. In *Gap v. Puna Geothermal Venture*, 106 Haw. 325, 333 (2004), the Supreme Court of Hawaii declared that "Hawai'i statutory and case law discourage retroactive application of laws and rules in the absence of language showing that such operation was intended." *See also Kramer v. Ellett*, 108 Haw. 426, 432 (2005) (noting general disfavor of retroactivity in law and specific disfavor in Hawaii); *State v. Garcia*, 96 Haw. 200, 211 (2001).

In *State v. Ikezawa*, 75 Haw. 210 (1993), the Supreme Court of Hawaii considered whether a decision overturning a prior ruling should be applied retroactively. Citing the "administration of justice and the integrity of the judicial process," the Supreme Court of Hawaii applied this Court's three-part *Chevron Oil* test and declined to apply its new ruling to the defendant retroactively even though a retroactive application of the new ruling would further the purpose of correcting the erroneous prior ruling. *Id.* at 220-23. The Court found that the defendant's reliance on the erroneous prior ruling was substantial and that applying the new ruling to the defendant retroactively would prejudice the defendant and "produce a substantially inequitable result." *Id.*

C. HAWAII VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY FAILING TO CONSIDER THE ISSUE OF RETROACTIVITY

In this case, Petitioner expressly objected to *In re Trust Estate of Dwight*, 80 Haw. 233 (1995) being applied retroactively (Appendix D at 63a-67a) and argued on rehearing that doing so violated his Fourteenth Amendment rights. Appendix E at 69a-73a. Not only does it appear that the Supreme Court of Hawaii failed to consider Petitioner's arguments and objections, but it apparently denied Petitioner oral argument as well.[2] Its ruling also appears to be in direct conflict with Hawaii's own precedent disfavoring retroactivity.

In this regard, this case is not unlike both *Brinkerhoff-Farris Trust & Savings Co.* and *Bouie*, as the Supreme Court of Hawaii effectively deprived Petitioner of due process in "the primary sense" by failing to consider his arguments and objections with respect to retroactivity. Also as in *Bouie*, the Supreme Court of Hawaii's decision does not appear to have any support in Hawaii's prior decisions. *Bouie*, 378 U.S. at 356. In this regard, this case calls to mind this Court's

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[2] The Supreme Court of Hawaii apparently holds oral arguments only rarely. At a meeting of local attorneys and judges in Honolulu in February 2006, the same month the decision was issued in this case, U.S. Supreme Court Justice Anthony Kennedy expressed concern to Hawaii Supreme Court Chief Justice Ronald T. Y. Moon, the author of the underlying decision, about the paucity of oral arguments held by the Court. "Justice Moon, I'm concerned about your court," Justice Kennedy reportedly stated. "U.S. Supreme Court justice expressed concern for Hawaii court," *Associated Press*, February 9, 2006.

statement in *Landgraf* regarding the process by which retroactivity decisions are reached:

> The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound . . . instinct[s] , . . . and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Landgraf, 511 U.S. at 270 (internal citation omitted). Of course, judges' instincts can only be sound to the extent that they are utilized, and it does not appear that there was any "process of judgment" with respect to the retroactive application of *In re Trust Estate of Dwight* to the facts of this case. The Supreme Court of Hawaii's failure to consider the issue of retroactivity, much less apply its own retroactivity precedent to the case at hand, despite Petitioner's express objection and argument that doing so would violate his Fourteenth Amendment rights, warrants review by this Court.

CONCLUSION

For the foregoing reasons, Judicial Watch respectfully requests that the petition for writ of certiorari be granted.

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